EXHIBIT A.

33 U. S. C. A. § 408.

"Taking possession of, use of, or injury to harbor or river improvements.

"It shall not be lawful for any person or persons to take possession of or make use of for any purpose, or build upon, alter, deface, destroy, move, injure, obstruct by fastening vessels thereto or otherwise, or in any manner whatever impair the usefulness of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States, or any piece of plant, floating or otherwise, used in the construction of such work under the control of the United States, in whole or in part, for the preservation and improvement of any of its navigable waters or to prevent floods, or as boundary marks, tide gauges, surveying stations, buoys, or other established marks, nor remove for ballast or other purposes any stone or other material composing such works: *Provided*, That the Secretary of the Army may, on the recommendation of the Chief of Engineers, grant permission for the temporary occupation or use of any of the aforementioned public works when in his judgment such occupation or use will not be injurious to the public interest. Mar. 3, 1899, c. 425, §14, 30 Stat. 1152."

EXHIBIT B.

UNITED STATES DISTRICT COURT.
Southern District of California,
Central Division.

Filed Mar. 10, 1959.

Clerk, U. S. District Court, Southern District of California.

By I. YOUNG, *Deputy Clerk.*

UNITED STATES OF AMERICA, *Plaintiff,* vs. ANCHOR OIL CORPORATION, ET AL., *Defendants.*	No. 800/58 HW-Civil.

Motion for Deferment of Hearing On Preliminary Injunction, and Ex-Parte Order.

COMES NOW the plaintiff, the United States of America, by its undersigned attorneys acting at the direction of the Attorney General, and moves that the plaintiff's motion for preliminary injunction, now scheduled for hearing on March 24, 1959, be placed off calendar, subject to being reset for hearing upon forty-five (45) days notice to the Class A defendants.

In support of this motion the plaintiff states the following:

1. With respect to the injunctive aspect of the above-entitled matter, the principal objective of the plaintiff is, and constantly has been, that a maximum effort be directed as quickly as reasonably possible toward abatement of subsidence in the Wilmington Oil Field. It was in further-

ance of this objective that the motion for preliminary injunction was initially filed on August 15, 1958, and is now pending in this Court.

2. Since the filing of the motion for a preliminary injunction, and particularly since the hearing on this matter on November 17-18, 1958, the plaintiff has been pleased to observe the manner in which some of the defendants (including most of the principal producers in the field) have been working to establish and place into effect programs designed to prevent the further sinking of the surface lands. The plaintiff has been particularly interested in the programs toward this end that the major defendants report that they will be able to accomplish at specific times in the immediate and near future, as shown by their documents filed with the Court on about February 24, 1959, pursuant to order. It is the present belief of the plaintiff, based upon the best information now available to it, that if the defendants accomplish on schedule all of the subsidence abatement activities outlined in their recent submissions to the Court, with reasonable and necessary extensions of those activities into the future, the problem of further subsidence probably will have been solved. The plaintiff therefore believes that it would be appropriate that the defendants be given an opportunity voluntarily to perform in accordance with their protestations.

3. In light of the foregoing, it appears unnecessary, for the time being, to litigate the matter of a preliminary injunction, and the plaintiff is willing to defer its present request for an injunction until such time as it appears to the plaintiff that the efforts currently being made by the defendants are less than those reasonably necessary to stop subsidence at the earliest possible time.

4. Inasmuch as the defendants have already had more than six (6) months within which to prepare for the hear-

ing on the motion for preliminary injunction, it appears that forty-five (45) days notice will be adequate to enable them to complete preparation for such hearing.

PERRY W. MORTON,
Assistant Attorney General of the United States.

LAUGHLIN E. WATERS,
United States Attorney.

WILLIAM P. GRAY,
Special Assistant to the Attorney General.

By s/ WILLIAM P. GRAY,
Special Assistant to the Attorney General.

EX-PARTE ORDER.

In light of the foregoing, the plaintiff's motion for preliminary injunction, now scheduled for hearing on March 24, 1959, is placed off calendar, subject to being reset for hearing upon forty-five (45) days notice to the Class A defendants.

Reply briefs heretofore ordered to be filed by March 9, 1959, may be filed not later than ten (10) days prior to such hearing on motion for preliminary injunction as may be set in the future upon forty-five days notice.

Dated: March 10, 1959.

HARRY C. WESTOVER,
United States District Judge.

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AUG 28 1959
JAMES R. BROWNING, Clerk

No. 56

In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, PETITIONER

v.

REPUBLIC STEEL CORPORATION, INTERNATIONAL HARVESTER COMPANY, AND INTERLAKE IRON CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
PERRY W. MORTON,
Assistant Attorney General,
ROGER P. MARQUIS,
HUGH NUGENT,
Attorneys,
Department of Justice,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 56

UNITED STATES OF AMERICA, PETITIONER

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REPUBLIC STEEL CORPORATION, INTERNATIONAL HARVESTER COMPANY, AND INTERLAKE IRON CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The memorandum of the District Court (R. 91-97) is reported at 155 F. Supp. 442. The opinion of the Court of Appeals (R. 2559) is reported at 264 F. 2d 289.

JURISDICTION

The judgment of the Court of Appeals was entered on January 22, 1959 (R. 2559). The petition for writ of certiorari was filed on April 21, 1959, and was granted on June 1, 1959 (R. 2582). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

STATUTES AND RULES INVOLVED

Section 10 of the Rivers and Harbors Act of September 19, 1890, 26 Stat. 426, 454, and Sections 10, 12, 13, 16, 17 and 20 of the Rivers and Harbors Act of March 3, 1899, 30 Stat. 1121, 1151-1155, as amended, 33 U.S.C. 403, 406, 407, 411, 412, 413, 415, are set forth in Appendix A, *infra*, pp. 46-53; and relevant excerpts are quoted in the Argument *infra*.

QUESTIONS PRESENTED

1. Whether the discharge of industrial wastes from steel mills into a navigable waterway of the United States, so as to reduce the capacity of the channel, is in violation of law.

2. Whether, if so, the United States is entitled to an order compelling the removal of the deposits thus caused and enjoining further obstruction, or may secure other relief.

STATEMENT

The District Court, after a lengthy trial, enjoined Republic Steel Corporation, International Harvester Company and Interlake Iron Corporation from depositing industrial solids in the Calumet River without first obtaining a permit from the Chief of Engineers of the Department of the Army providing conditions for the removal of deposits, and ordered each of the companies to restore the depth of the channel to 21 feet by removing designated percentages of existing deposits. The Court of Appeals reversed with directions to dismiss the complaint on the ground that the defendants' actions were not prohibited by law (R. 2574) and, alternatively, that injunctive relief could not be granted (R. 2580).

The District Court has made extensive findings of fact (R. 98-108). The respondents challenged many of those findings in the trial court by various motions (R. 114-264) which were overruled (R. 266), and repeated those challenges in the Court of Appeals. Because of the view it took of the case, the Court of Appeals found "no occasion to state or discuss the numerous other grounds upon which defendants attack the validity of the decree" (R. 2580). Although International repeats its objection to the sufficiency of the evidence by its fifth question presented in its brief in opposition to certiorari (Br. in Opp., p. 2), we believe the issues presented by the petition and the oppositions (cf. Interlake Br. in Opp., p. 2 fn.; International Br. in Opp., pp. 6-7) are primarily questions of law, and accordingly we shall approach the case here on the basis of the facts found by the trial court without a detailed review of the underlying evidence.

Calumet Harbor is located some 11 miles south of Chicago on Lake Michigan on the Illinois-Indiana line. The Calumet River originally emptied into Lake Michigan, but in 1922 its flow was reversed so that now, except in heavy rains, it flows away from the lake, joins the Grand Calumet and Little Calumet Rivers and, by means of the 16-mile Calumet-Sag Channel, flows to the Chicago Sanitary and Ship Canal and eventually into the Mississippi River (Fdgs. 3-7, R. 98-99). The Calumet, which because of its slow current is more of a canal than a river, is a busy waterway used by a large number of lake and foreign ships, many of which are 600 feet or more in length with as much as a 60-foot beam, a loaded draft of 21 feet and propeller diameter of 15 feet (R. 98). In 1932, Calumet Harbor and

River were described as "one of the major ports on the Great Lakes for the receipt of iron ore and other bulk commodities" (H. Doc. No. 494, 72d Cong., 2d Sess., p. 3, Cong. Doc. Ser. No. 9682). In addition to the respondents, United States Steel (formerly Illinois Steel Co.) and Youngstown Sheet and Tube Company have iron plants on Calumet Harbor and the entrance channel of the Calumet River (R. 105) and various other industrial establishments are located on the river.

The Calumet Harbor and River have been the subject of at least 15 reports to Congress, pursuant to which various projects have been undertaken to promote navigation. See H. Doc. No. 494, *supra*, pp. 9-12; Fdg. 9, R. 99-100. Since about 1933 the channel of the river in the area in question, designated stations 0 to 300,[1] has been maintained at a depth of 21 feet and width of 200 feet (Fdg. 9, R. 99).

The respondents have for many years operated mills on the banks of the river for the production of iron and related products which create industrial waste. That waste consists of flue dust (containing a high percentage of iron oxide, slag, calcined lime and other solids), coke breeze, mill scale and other solids. The companies use vast quantities of water from the river, totaling some 6,186,120,000 gallons each month. The water is returned to the Calumet through 27 sewers (Fdgs. 10-18, R. 100-101). Each respondent operates a thickener, which is a tank-type settling basin by means of which a substantial amount of the wastes are recovered, but the discharge into the river through the sewers contains many fine particles which tend to

[1] These are 100-foot intervals which commence at the Elgin, Joliet and Eastern Railroad bridge, which is located approximately at the original mouth of the river.

flocculate into larger units and to deposit on the river bottom (Fdgs. 19, 30; R. 101, 103-104).

The trial court found that prior to 1951 the three respondents had periodically dredged these industrial solids from the river adjacent to their plants when requested to do so by the United States Army Corps of Engineers and in 1951 the channel was restored to a minimum depth of 21 feet, the companies prorating the costs according to their pig iron production (Fdgs. 20, 21; R. 101-102.[2] No similar joint restoration has been undertaken since that time and the only work has been removal of relatively small quantities of material in connection with removal of deposits from slips and along river docks of International Harvester and Interlake (Fdg. 21, R. 102). Soundings since 1951 have shown a progressive decrease in the depth of the river in the vicinity of the companies' mills (Fdg. 25, R. 103), but all of the companies have refused the demand of the Corps of Engineers that they dredge in the vicinity of their mills (Fdg. 26, R. 103). In reporting the Civil Functions, Department of the Army, Appropriation Bill for the Fiscal Year 1957, which included funds for maintenance of rivers and harbors, the House Committee said (H. Rept. No. 1345, 83d Cong., 2d Sess., p. 10, Cong. Doc. Ser. No. 11738):

> In Calumet River and Harbor, Illinois, and Cleveland Harbor, Ohio, a serious problem exists

[2] Republic says (Br. in Opp. p. 9) that it did no dredging "in the channel of the Calumet River" adjacent to its plant from 1945 until 1951 and that there was no joint dredging by the three defendants prior to 1951 or subsequent to 1951. There is no dispute that there was joint dredging *in* 1951. And an exhibit shows that in 1950 Republic had dredged the river adjacent to its plant, as the findings state, although this dredging was not in the channel but was between the dock and the east channel line (Gov. Ex 41, R. 2465).

with reference to illegal deposits by private industries in the navigation channels. These deposits are in violation of Section 13 of the 1899 River and Harbor Act. The deposits have created shoaling conditions to the detriment of the Federally maintained channels. As of the time of the hearings on this bill the Corps of Engineers had been unsuccessful in their efforts to have all of the companies responsible pay their proportionate share toward removal of the deposits. The very companies which have refused to cooperate are beneficiaries of both construction and maintenance funds provided in this bill. Such an attitude on the part of such local interests is inconceivable. It will be expected that the Corps of Engineers will make vigorous efforts to secure proper compliance with the law governing illegal deposits, including action by the Department of Justice if necessary. The Chief of Engineers is directed to file with the committee, not later than December 15, 1954, the actions taken on this matter and the results obtained.

The United States filed its complaint on November 1, 1954, alleging that the respondents' actions were in violation of 33 U.S.C. 403 and 407 (paragraph 8, R. 8) and that the discharge and deposit of industrial solids constituted an obstruction to a navigable water of the United States and an interference with interstate and foreign commerce (paragraph 9, R. 8-9). Trial by the court lasted from February 20 to April 11, 1956. During the trial, on April 2, the complaint was amended, primarily to add specific reference to the

stretch of the river from stations 105 to 300 in the allegations and in the prayer for relief (R. 69-74). Answers to the complaint as amended were filed on April 9 in which, *inter alia,* International repeated statements it had made in its original answer (R. 21-23) that an injunction against it should be denied because it was ready, willing and able to dredge all material, if any, for which it had any responsibility (R. 82-84).

A great deal of the evidence was addressed to the respondents' claims that the filling of the channel was due to natural causes or the operation of other industries along the river. The trial court's memorandum, filed June 19, 1957, concluded that these contentions "have not been sustained by the evidence" (R. 93) and its findings filed the same day relate in some detail the evidence as to the possible causes of shoaling in the river, resulting in ultimate findings that (Fdgs. 38, 39; R. 105-106):

> 38. The preponderance of the evidence shows that all three defendants, through their various sewer outfalls, are emptying industrial solids into the Calumet River, and the Government is entitled to an injunction against all of the defendants restraining such practice in the future.
>
> 39. The preponderance of the evidence further shows that the action of the defendants in dumping industrial solids into the Calumet River in the vicinity of their mills since 1951 has resulted in considerable shoaling in the Federal Channel reducing the depth of the channel in some places to 17 feet and in some instances to 12 feet, along the sides of the channel, thus reducing the navigable

capacity of the channel and providing a serious hazard to ships using the channel.

The findings were that 81.5% of the waste in the channel was chargeable to the respondent companies, of which there was allocated 36.78% to Republic Steel, 36.31% to International Harvester and 26.91% to Interlake (Fdg. 48, R. 107-108). The court concluded that the United States was entitled to relief and entered a decree, to be effective within one year, which (1) enjoined the companies from depositing industrial solids and flue dust in the channel without first obtaining a permit from the Chief of Engineers providing for satisfactory conditions for the removal of such future deposits and (2) ordered them to restore the channel to a minimum depth of 21 feet (R. 111-114).

Since the sufficiency of the evidence to support the findings was not the basis for the decision below, we shall not attempt to point out the errors in the respondents' statements of the case, particularly Republic's (Br. in Opp., pp. 3-8; see also Interlake Br. in Opp., p. 4), which represent a version of the facts which the trial court rejected. Neither shall we explore the subject of joint versus several liability and its ramifications, except to say that we do not agree with Interlake (Br. in Opp., p. 3 fn.; see also p. 5) that liability of the respondents is several and that therefore each finding of fact must be supported by evidence directly relating to each respondent.[3]

[3] Since we have no doubt that each of the respondents is able to and will obey any final decree entered, the question whether relief should be ordered as joint or several liability is of little practical importance. The District Court said that if the Government had sought such liability it would have been inclined to impose it (R. 93). Rule 54(c), F.R.Civ.P., would entitle the Government

SUMMARY OF ARGUMENT

I

Three established facts demonstrate that the respondents have violated the basic prohibition of the Rivers and Harbors Act of 1899 against obstruction of navigable waters. These facts are (1) that the Calumet Harbor and River are navigable waters subject to federal control, (2) that shoaling of the river has produced an obstruction to navigation, and (3) that the respondents are responsible for this shoaling.

A. By Section 10 of the Rivers and Harbors Act of 1899, which reenacted the similar provision of the 1890 Act, Congress prohibited *all* unauthorized obstructions to the navigable capacity of waters of the United States. This section also contains two provisions as to specific activities the Department of the Army may authorize. However, the respondents have not obtained authorization from either Congress or the Department of the Army for the activities challenged in this suit. This case is thus controlled by *Sanitary District* v. *United States*, 266 U.S. 405, where this Court held that diversion of water from Lake Michigan without authorization effected an obstruction to navigation which was prohibited by the Act of 1899. This conclusion was reaffirmed in *Wisconsin* v. *Illinois*, 278 U.S. 367, in which the Court stated that the *Sanitary District* decision meant (1) that Congress had by the 1899 Act exercised the power to protect the navigability of Lake Michigan and the other lakes and rivers in the Great Lakes watershed, (2) that Congress could confer on

to such relief whether it asked for it or not, if the right thereto appeared from the evidence. It does not appear how the evidence would have been changed had the Government claimed joint liability.

the Secretary of War the administrative function of passing on the issue of unlawful injury to navigation, and (3) that Congress had done so.

The effect of the decision of the Court of Appeals is to limit the general prohibition of Section 10 to the specific obstructions listed in the later clauses of the section and thereby to eliminate the general prohibition against obstructions. But Congress prohibited *all* obstructions, not merely *some* of them. The authority given to the Department of the Army to *permit* certain activities in navigable waters is not a limitation on the general prohibition.

B. The legislative history of the Act of 1899 makes plain the intent of Congress to prohibit all unauthorized obstructions to navigable capacity. After this Court held, in *Willamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1, that there was no common law of the United States prohibiting obstructions to navigable streams, Congress exercised its constitutional power over navigable waters in Section 10 of the Act of 1890, and the congressional debates show that the Act was intended to remedy the effect of the *Willamette* case. In the 1899 Act, Congress codified the various statutes as to navigable waters with the aim of expanding rather than limiting the federal control to be exercised.

In *Sanitary District* v. *United States*, *supra*, this Court referred to the 1899 Act as a "broad expression of policy in unmistakable terms, advancing upon" the 1890 Act, and in *Wisconsin* v. *Illinois*, *supra*, the Court stated that the 1899 Act "amplified the provisions of an earlier Act of 1890" and that "[t]he policy carried out in the Act of March 3, 1899, had been begun in the Act of September 19, 1890." The argument of the Court of

Appeals that the broader provisions of the 1890 Act were narrowed in 1899 cannot stand in the face of these statements. In the light of the 1899 Act's legislative history and of this Court's statements about its relationship to the 1890 Act, the later Act cannot now be said to be a withdrawal from the earlier statute. There is no basis in statutory language, congressional policy, or the decided cases for the conclusion that the creation and continuance of an obstruction to navigation without authorization is legal under either Act, and certainly no more under the second Act than under the first.

C. The administrative construction reported to and ratified by Congress has consistently been that all unauthorized obstructions to navigable capacity are prohibited, and especially industrial deposits of the nature involved in this case. Since 1909, the Corps of Engineers has required Illinois Steel Company to dredge shoals resulting from deposits of solids from its steel plant at the mouth of the Calumet. The fact that this particular company was dredging the Calumet was reported to Congress on at least two different occasions, in 1913 and 1932, and, on the latter occasion, Congress specifically considered this private dredging in determining the cost of a Calumet improvement project. Demands identical to those made on Illinois Steel were made on respondents from 1941, and the 1954 House Appropriations Committee Report to Congress on the Army's Civil Functions Appropriations shows the committee's agreement with the Engineers that respondents were required by the 1899 Act to dredge the river.

II

In addition to violating the general prohibition against obstructions in the first clause of Section 10, the

respondents' actions have violated specific prohibitions of Sections 10 and 13 of the Act of 1899.

A. The respondents have made an illegal "fill" of the navigable channel in violation of the last provision of Section 10. They have introduced solids into the Calumet which have accumulated in the channel, producing a deposit which is a "fill" under any ordinary meaning of the term. The attempt to qualify the term to mean only fills accomplished by "works," in a narrow meaning of the latter term, is contrary to the statutory language and intent of Congress.

B. The respondents have further violated Section 10 by illegally altering and modifying the condition and capacity of the channel. *Sanitary District* v. *United States, supra,* held that the Act of 1899 barred unauthorized diversion of water affecting navigable capacity. Plainly, raising the bottom of navigable water affects its navigable capacity just as much as lowering its top.

C. The respondents' actions also constitute a deposit of refuse matter in the channel, made illegal by Section 13 of the 1899 Act; and they do not come within that section's exception of matter "flowing from streets and sewers and passing therefrom in a liquid state." The waste products discharged by respondents, though carried in liquids, are not liquids but solids, and they do not fall into the category of ordinary sewage which, as the legislative history shows, was the true scope of the exception. The way in which Congress met new problems arising from pollution of navigable waters also shows that Section 13 was intended to deal with matter in suspension, not dissolved, which could cause shoaling. New sections were recommended by the War Depart-

ment and enacted by Congress to deal with pollution from the discharge of oil and other substances, but Section 13 was left undisturbed to meet the problem of the deposit of such industrial wastes as are here involved.

III

The effect of holding that injunctive relief is not available is to deny to the United States the most direct means of removing obstructions to navigation on the curious premise that Congress enacted prohibitions to protect navigation without providing adequate authority to require the removal of those obstructions.

A. Section 12 of the Rivers and Harbors Act of 1899 (33 U.S.C. 406, Appendix A, *infra,* pp. 47-48) provides specific authority for an injunction. Immediately after providing a criminal penalty for violation of prior provisions of the Act, including Section 10, it provides that "the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by * * * injunction" on suit by the Attorney General. The suggestion of the court below that the term "structures" is inappropriate to cover shoals caused by the deposit of industrial wastes is not in accord with the plain intent of the statute; there is no reason for authorizing the removal of wooden, concrete, or steel obstructions but allowing embankments of loose materials to remain. The fact that the prior statute clearly covered all obstructions strengthens this interpretation rather than weakens it since the purpose of the 1899 Act was to codify and strengthen the 1890 Act, not to soften it.

Moreover, *Sanitary District* v. *United States, supra,* explicitly held that no statute is necessary to authorize the Attorney General to bring a suit to enjoin the violation of the Act of 1899, as against the very contention here urged. The Attorney General can seek an injunction against any illegal interference with interstate commerce, and general equitable principles make injunctive relief clearly proper here: (1) there is no adequate remedy at law for the continuous violation of the statute; (2) equity abhors a multiplicity of suits; (3) damages would be inadequate.

B. If it is held that no injunction should be granted, the United States is, in any event, entitled to damages. Under Rule 54 (c) of the Federal Rules of Civil Procedure, the fact that no specific claim to damages was incorporated in the complaint does not preclude a judgment for damages if it appears that the United States would otherwise be entitled to that relief. Here, where the wrongful action of the respondents imposes on the United States the obligation to remove the obstruction they have placed in navigable waters, recovery of the cost of such removal is clearly appropriate. The decision of the court below to dismiss the complaint means either that the United States cannot get relief for the established violation or that it must sue again to get damages.

ARGUMENT

I

The Respondents' Actions Violate the Basic Prohibition in Section 10 of the Rivers and Harbors Act of 1899 Against Obstructions to Navigable Capacity

It is undisputed that the Calumet Harbor and River are subject to the federal navigation control because

of the very important interstate and foreign commerce which plies this busy waterway. Undoubtedly the recent opening of the St. Lawrence Seaway will augment that important commerce. A second established fact is that the filling in or shoaling of the Calumet River so as to reduce the available 21 foot depth to 17 feet, and in some instances 12 feet, reduces the navigable capacity of the channel and provides a serious hazard to ships using it. Four to nine feet is a very important difference on the Great Lakes where the water level has relatively small variations and shipping for economic reasons is based on very small margins of draft of vessels. See drafts as listed on Republic's Ex. 30 for vessels in 1955 (R. 2297). Cf. *Wisconsin* v. *Illinois*, 278 U.S. 367, 407-409. The third fact, not disputed in the opinion of the court below, is that the respondents are responsible for the creation of that obstruction. These three fundamental facts establish, we submit, violation of law.

A. *Congress has prohibited all unauthorized obstructions to navigable capacity.*—Section 10 of the Rivers and Harbors Act of 1890 prohibits "the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction." Section 10 of the Rivers and Harbors Act of 1899 reenacted that prohibition by providing that "the creation of any obstruction, not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited." Section 10 of the 1899 Act then added two specific provisions as to activities which the War Department may authorize. The Attorney General ruled that, in the 1899 Act, Congress

assumed full federal control to protect the navigability of United States waters and in the two latter provisions of Section 10 delegated to the Chief of Engineers and the Secretary of War the function of determining what activities should be permitted where only minor interference with navigable waters would result. 34 Op.A. G. 410, 411-412. The opinion stated that this had been the administrative construction of the statute. *Id.* at pp. 416-417. This Court agreed in *Wisconsin v. Illinois,* 278 U.S. 367, that actions permitted by the War Department under the second and third clauses of Section 10 were "affirmatively authorized by Congress" within the meaning of the basic prohibition, Chief Justice Taft stating (pp. 413-414):

> *. * * The Supreme Court of Maine in *Maine Water Co. v. Knickerbocker Steam Towage Co.,* 99 Me. 473, took the same general view in construction of the same section. It held that the broad words of the first clause of that section were not intended to limit the second and third clauses and that Congress's purpose was a direct prohibition of what was forbidden by them except when affirmatively approved by the Chief of Engineers and the Secretary of War. We concur in this view.
>
> The true intent of the Act of Congress was that unreasonable obstructions to navigation and navigable capacity were to be prohibited, and in the cases described in the second and third clauses of Section 10, the Secretary of War, acting on the recommendation of the Chief of Engineers, was authorized to determine what in the particular cases constituted an unreasonable obstruction.

> This construction of Section 10 is sustained by the uniform practice of the War Department for nearly thirty years. Nothing is more convincing in interpretation of a doubtful or ambiguous statute. [Citations omitted.]
>
> The practice is shown by the opinion of the Acting Attorney General, transmitted to the Secretary of War, 34 Op. Atty. Gen. 410, 416. The Secretary of War acted on this view on May 8, 1899, about two months after the passage of the Act. This was followed by the permits subsequently granted down to March 3, 1925. The fact that the Secretary of War acted on this view was made known to Congress by many reports.[4]

There is no suggestion that respondents have received any authorization from the Department of the Army to obstruct the channel of the Calumet. Nor has Congress otherwise affirmatively authorized such activity.[5] The case is thus the same as *Sanitary District v. United States*, 266 U.S. 405, where this Court affirmed a decree enjoining the diversion of water from Lake Michigan through the Chicago River. Applying the 1899 Act, the Court said (p. 429):

> There is neither reason nor opportunity for a construction that would not cover the present case.

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[4] Both the Attorney General's opinion and this Court's decision related to the authority of the War Department to permit the Sanitary District of Chicago to withdraw water from Lake Michigan.

[5] The observation of the Court of Appeals that "Congress did not give the Army or its Engineers authority to authorize, sanction or recommend an obstruction which it had prohibited" (R. 2568), ignores the holding of *Wisconsin v. Illinois*, 278 U.S. 367, that Congress' purpose was a prohibition of obstruction "except when affirmatively approved by the Chief of Engineers and the Secretary of War."

> As now applied it concerns a change in the condition of the Lakes and the Chicago River, admitted to be navigable, and, if that be necessary, an obstruction to their navigable capacity, *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, without regard to remote questions of policy. It is applied prospectively to the water henceforth to be withdrawn. This withdrawal is prohibited by Congress, except so far as it may be authorized by the Secretary of War.

The decision in that case does not rest on enforcement of "treaty obligations to a foreign power" (R. 2577). Mr. Justice Holmes was at pains to point out, three times, that the treaty issue was an alternative ground and the "main ground is the authority of the United States to remove obstructions to interstate and foreign commerce" (266 U.S. at pp. 423-424, 425, 426). He concluded his discussion of this phase of the case as follows (p. 426):

> Evidence is sufficient, if evidence is necessary, to show that a withdrawal of water on the scale directed by the statute of Illinois threatens and will affect the level of the Lakes, and that is a matter which cannot be done without the consent of the United States, even were there no international covenant in the case.

This conclusion was reaffirmed in *Wisconsin* v. *Illinois*, 278 U.S. 367, in which the Court stated (p. 414):

> The construction of Section 10 of the Act of March 3, 1899, was settled by this Court in the decision of the first Chicago Drainage Canal case in 266 U.S. 405, 429. The decision there reached

> and the decree entered can not be sustained, except on the theory that the Court decided first that Congress had exercised the power to prevent injury to the navigability of Lake Michigan and the other lakes and rivers in the Great Lakes watershed, and second that it could properly and validly confer the administrative function of passing on the issue of unlawful injury or otherwise on the Secretary of War, and that it had done so. To give any other interpretation would necessarily be at variance with our previous decision.[6]

The approach of the Court of Appeals seems to have been that although Section 10 of the 1899 Act in terms prohibits all unauthorized obstructions, that prohibition is to be construed in the light of the specific clauses which follow it, and that only obstructions covered by those specific clauses are illegal. We defer for the moment the issue of the construction of those clauses. Under the view of the Court of Appeals, the basic prohibition against obstructions would simply be expunged from the statute. Even if the court is right that the delegation to the Department of the Army does not cover all activities which may create obstructions, the result is, from the clear language of the Act, not that those obstructions are legalized, but rather that permission to engage in the activity must be obtained from Congress itself. In short, Congress prohibited *all* unauthorized obstructions, not merely some of them.

Such a view does not, the Court of Appeals to the contrary, eliminate need for the second and third clauses

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[6] This full paragraph demonstrates the error of the notion (R. 2577) that *Wisconsin* v. *Illinois*, *supra*, represented a retreat from the *Sanitary District* case.

of Section 10 and for Section 13 (R. 2568). In the first place, those clauses, implementing the basic prohibition against obstructions, make the unauthorized erection of piers, etc., and the unauthorized filling, altering, etc., of navigable channels illegal without any necessity of proving actual obstruction to navigable capacity. Likewise, unauthorized deposits prohibited by Section 13 are illegal without regard to actual effect on navigable capacity. Secondly, both the Section 10 and Section 13 provisions represent the delegation to the Department of the Army of the function of permitting particular activities where the desirability for them, in the Department's opinion, outweighs the interference to commerce.

The construction of the 1899 Act adopted by the court below, permitting the creation and continuance of certain obstructions in fact to navigable capacity, is not only contrary to the terms of the Act and decisions of this Court under it [7] but, as we shall now show, flies in the face of the clear intention of Congress and would re-create the unsatisfactory situation which existed before 1890.

B. *The legislative history of the Rivers and Harbors Act makes plain the intent of Congress to prohibit all*

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[7] *United States* v. *Wilson*, 235 F. 2d 251 (C.A. 2), so heavily relied upon by the Court of Appeals, did not hold that the unauthorized obstruction created by the sunken barge was legal, but merely that the remedies of Sections 15 and 19 of the 1899 Act, relating to removal of sunken vessels, were exclusive and injunctive relief was not available. The two trial court cases cited by the opinion (R. 2567-2568) are clearly irrelevant. *United States* v. *Burns*, 54 Fed. 351 (D. W. Va.), a case decided prior to the 1899 Act, held that the acts of one user of the stream in floating logs, rafts, etc., thereby interfering with other navigators, was not a prohibited obstruction. *United States* v. *Brazoria County*, 2 F. 2d 861 (S.D. Tex.), held that natural erosion from a drainage ditch was not a prohibited obstruction.

unauthorized obstructions to navigable capacity.— For present purposes that history commences in 1888 when this Court held that there was no common law of the United States prohibiting obstructions and nuisances to navigable streams and that, until Congress should act, the only remedy, if any, was under state law. *Willamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1. Congress promptly exercised its power in Section 10 of the Rivers and Harbors Act of 1890, barring the "creation of any obstruction, not affirmatively authorized by law." The legislation was introduced by Senator Dolph, who had represented the defeated party in the *Willamette* case, and the debates show the Act was intended to remedy the result of that case. 21 Cong. Rec., 8604, 8605.[8]

In Appendix B, *infra*, pp. 53-64, we detail the legislative history of the 1899 Act, and compare in parallel columns its relevant provisions with the then existing law. In summary, the history shows that in 1896 Congress directed the Chief of Engineers to prepare a codification of the laws as to navigable rivers, which he did the following year, submitting the full text of existing laws and a proposed act "Revising and Enlarging Laws for the Protection of Navigable Waters." H. Doc. No. 293, 54th Cong., 2d Sess. In 1899, Senator Frye of the Senate Commerce Committee presented the bill on the floor of the Senate as an amendment to the Rivers and Harbors Appropriation Act then under consideration. He assured the Senate that the Commerce Committee had considered the bill at length and that no

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[8] This history is the obvious answer to the suggestion of the Court of Appeals, based primarily on the *Willamette* case (R. 2580), that the present argument should be made to Congress, not the courts.

material change was made in existing law and that only slight changes to eliminate ambiguities had been made. A similar statement was made to the House in connection with the conference report. 32 Cong. Rec. 2296-2298, 2923. A change was made in the prohibition against obstructions, so as to tighten federal control, by altering the phrase "not affirmatively authorized by law" to read "not affirmatively authorized by Congress," thereby rendering state action insufficient to justify obstructions.[9] Another change, from "obstruction" to "structure" in the injunction provision, will be discussed later (*infra*, pp. 40-41).

In *Sanitary District* v. *United States*, 266 U.S. 405, this Court referred to the 1899 Act as a "broad expression of policy in unmistakable terms, advancing upon" the 1890 Act (p. 429), and in *Wisconsin* v. *Illinois*, 278 U.S. 367, it was stated that the 1899 Act "amplified the provisions of an earlier Act of 1890" (p. 405) and that "[t]he policy carried out in the Act of March 3, 1899, had been begun in the Act of September 19, 1890" (p. 412). The notion of the Court of Appeals that Congress in the 1899 Act receded from the policy behind the 1890 Act is thus at war with the clear purpose of Congress as recognized by this Court. The Court of Appeals said that "[i]t appears reasonably certain that the court in each of those cases [*United States* v. *Bellingham Bay Boom Co.*, 176 U.S. 211, and *United States* v. *Rio Grande Dam and Irrigation Co.*, 174 U.S. 690] would have reached a different result absent an express statutory pro-

[9] In 1896, a circuit court had held that state authorization was sufficient under the 1890 Act, in *United States* v. *Bellingham Bay Boom Co.*, 72 Fed. 585 (D. Wash.), and in 1900 this Court agreed with that view. 176 U.S. 211.

vision authorizing injunctive relief" (R. 2576). But it was these two cases which were relied upon in the *Sanitary District* case, obviously with the understanding that they were still good law.[10]

This same mistaken view of congressional policy is expressed in the statement, founded on the like declaration in *United States* v. *Wilson*, 235 F. 2d 251 (C.A. 2), that the "Act of 1890 was repealed by the Act of 1899" (R. 2575). Rather than in terms repealing the 1890 Act, the 1899 Act merely repealed "all laws or parts of laws inconsistent with the foregoing sections". Consequently, the Ninth Circuit, within six years of passage of the 1899 Act, held that a log boom obstructing navigation might be enjoined under both statutes, saying (*United States* v. *Wishkah Boom Co.*, 136 Fed. 42, 45):

> Section 20 of the act of 1899 repeals only "all laws or parts of laws inconsistent with the foregoing sections," and contains the proviso "that no action begun or right of action accrued prior to the passage of this act shall be affected by this repeal." It is only necessary to quote the repealing clause to show that both the act of 1890 and that of 1899 are operative, as far as the present case is concerned. The provision of the earlier act prohibiting the maintenance of such obstructions is not inconsistent with the later act prohibiting the erection thereof, and, again, it is evident

[10] The *Rio Grande* opinion was announced almost three months after the 1899 Act was signed by the President. It seems unreasonable to believe that this Court would not have referred to intervening law which would have had the drastic effect attributed to it by the Court of Appeals. And the *Bellingham* case was decided almost 11 months after the 1899 Act became law.

that a right of action had accrued under the first act prior to the date of the repeal."

The court went on to hold that the case was controlled by the *Bellingham Bay Boom* case, saying (p. 45): "We find it impossible to distinguish it [the present case] from that case in any essential particular."

On the present issue (viz., are all obstructions to navigable capacity illegal?) the *Wishkah* case is in clear accord with the language of the Act, the intent of Congress, and the decisions of this Court enforcing the legislative policy. These considerations were not material to the issue before the Second Circuit in the *Wilson* case, which was not whether the obstruction to navigation caused by the sunken barge was legally permitted, but rather what remedy was available to obtain its removal. We do not quarrel with the conclusion that, in view of the specific and detailed provisions as to removal of sunken vessels, the remedy of injunction compelling removal was not available. However,

[1] In a footnote, the *Wilson* case said that the Ninth Circuit had advanced the "alternative and unimpeachable ground" that the cause of action occurred prior to the 1899 Act. But the Ninth Circuit, deciding the case in 1905, was dealing with an injunction and was certainly not contemplating such a vain act as ordering removal of a log boom which could be immediately re-established and, under the *Wilson* theory, be immune from injunctive order. Our examination of the original records and briefs in this case shows that the boom was formed by piling driven in the bed of the river and logs and timbers moored and fastened to them. The appellee argued that the boom was merely temporary and not a permanent obstruction. The appellee also claimed the 1890 Act did not apply because it was repealed and the 1899 Act did not apply because it did not punish "continuance" of obstructions, the boom having been erected on one side in 1887, the other in 1897. In a reply brief the United States contended that both acts applied and also that a right of action under the 1890 Act was not lost by any repeal of it.

that case suggests no basis in statutory language, congressional policy or the decided cases for a conclusion that the creation and continuance of an obstruction to navigation, without special statute or permit from the Department of the Army, is legally permissible.

C. *The administrative construction reported to and ratified by Congress has consistently been that all unauthorized obstructions to navigable capacity are prohibited.*—The opinion below might suggest the thought that it is only in recent years that administrative officials have taken the view that all obstructions to navigable capacity, however caused, are prohibited and that theretofore the United States had undertaken to bear the expense of repairing the injury to navigable capacity resulting when solids are deposited by means of dilution in water discharged through pipes or sewers in connection with disposal of industrial or domestic wastes. Nothing could be further from the truth. There is a 50-year history relating directly to the Calumet Harbor and River, frequently reported to and acted upon by Congress. In Appendix C, *infra*, pp. 64-99, we have set forth in chronological order the relevant administrative actions and congressional materials.[12] They show that Illinois Steel Co., now United States Steel, has long had a plant located on Calumet Harbor.[13] In 1909 the District Engineer wrote that Company as follows:

> It has been reported to this office that a great deal of solid material is flowing out into Calumet

[12] This material may be appropriately presented to this Court. See *Minnesota* v. *United States*, 305 U.S. 382, 390.

[13] Respondents sought to attribute responsibility in part for the deposits here in question to this plant. (See Fdg. 34, R. 104-105; Interlake Br. in Opp., p. 4; International Br. in Opp., p. 4.)

> River through your 36 inch sewer pipe passing through the North Pier, and that such material settles in the channel not only at the mouth of the sewer but that it spreads to considerable extent gradually filling up the channel.
>
> You are hereby requested to take some steps to prevent such filling either by suitable and effective screening or by a catch-basin placed in such a manner that it will catch the solids before they reach the mouth of the sewer.

Shortly thereafter, a survey of Chicago Harbor and adjacent waterways was reported to Congress, (H.Doc. No. 237, 63d Cong., 1st Sess., Cong. Doc. Ser. No. 6542), containing, *inter alia,* a letter from Illinois Steel (p. 160) saying that the harbor at the mouth of the Calumet "is too shallow for the ore boats when fully loaded. We are compelled to do dredging every year." Thereafter, the District Engineer required the Company to dredge to remove shoals in 1918, 1920, 1924, 1927, 1928, 1931 and 1937 (Appendix C, *infra,* pp. 68-69, 76-77, 79-81, 86-87). In 1932 an improvement of Calumet Harbor and River, involving construction of breakwaters and dredging of the harbor, dredging of the river channel, etc., was recommended (H.Doc. No. 494, 72d Cong., 2d Sess., Cong. Doc. Ser. No. 9682).[14] The Division Engineer, in estimating cost of the harbor dredging, said (p. 24):

> (It is assumed, in this estimate, that the shoal adjacent to the outer bulkhead of the Illinois Steel Co. will be removed by that company to the depth of 21 feet originally provided by the

[14] Judicial notice was taken of this document at the beginning of the trial (R. 303), and it was later identified as Republic's Exhibit 12 (R. 887).

United States. The material affected is metalic dust and ore refuse from the mill which is stated by the owners to have a value of $2 a ton.)

See also pp. 34, 39. The project was authorized as described in the report, Act of August 30, 1935, 49 Stat. 1028, 1036. The project was thus approved and executed on the understanding that it was the responsibility of the steel company to remove the shoals caused by its deposit of flue dust, and the cost of the project was determined accordingly. These actions would seem to constitute ratification of the administrative construction. *Ivanhoe Irrig. Dist.* v. *McCracken,* 357 U.S. 275, 293-294; *Fleming v. Mohawk,* 331 U.S. 111, 119; *Brooks* v. *Dewar,* 313 U.S. 354, 361; *Swayne & Hoyt, Ltd.* v. *United States,* 300 U.S. 297, 302. And this long-established administrative construction, standing alone, is entitled to great weight even though, in the past, the matter was settled by consent rather than in litigation." *F.T.C.* v. *Mandel Brothers,* 359 U.S. 385, 391.

The present litigation is by no means the first demand made upon respondents. In 1941 demand was made on Republic to remove a shoal just downstream from its sewer outfall, the District Engineer stating (Appendix C, *infra,* p. 87), "Such discharge of material into the river is in violation of Federal law and eventually will seriously obstruct navigation." In 1942 demand was made upon Interlake to remove a shoal, in substantially the same language. In 1944 another demand was made upon Interlake in about the same form, with the addition of a quotation from Section 13 of the 1899 Act. Demands were likewise made on Interlake in 1945, 1946, 1947, 1948 and 1949. Demands

were made on International Harvester in 1944, 1945, 1947, 1949 and 1950. (Appendix C, *infra*, pp. 88-96.) And, of course, the report to Congress in 1954 shows the same administrative understanding and agreement thereto, at least by the House Committee (Appendix C, *infra*, pp. 98-99).

II

The Respondents' Actions Violate Specific Prohibitions of Sections 10 and 13 of the Rivers and Harbors Act of 1899

In Point I we have demonstrated that all acts which result in obstructions to navigability are illegal and that, in view of the proof of such obstructions here, the respondents' acts are illegal. We shall now show that, regardless of whether they result in obstruction, those actions violated specific provisions of Sections 10 and 13 of the 1899 Act. The proper construction and application of those prohibitions are, of course, important to the United States, beyond the facts of this particular case, because they require the consent of the Secretary of the Army before certain specific acts are performed, regardless of whether there is proof of obstruction.

A. *The respondents have made an illegal "fill" of the navigable channel.*—The deposit of industrial solids resulting in choking the channel is prohibited by the last provision of Section 10 that

> * * * it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity * * * of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

The Court of Appeals, reading "excavate or fill" together, said that it would be "unreasonable" to refer to removal of material in the water pumped from the channel "as an excavation and almost as unreasonable to think of the discharge as a fill" (R. 2570). But it is not the removal of material from the channel, or its return thereto, of which we here complain, though the statute would undoubtedly cover that operation if the river bed were rearranged. It is the introduction of solids which, even though transported by the water, operate to fill in the channel and cause the obstruction. However accomplished, that deposit is, we submit, reasonably embraced in the term "fill". Certainly, in view of the widespread use of hydraulic processes, an exception for fills accomplished by transport in dilution would create a serious loophole in the statute, contrary to the fundamental congressional purpose. As in the case of the general prohibition of obstructions, Congress forbade all unauthorized fills, not merely those accomplished in some particular manner. This is an essential element of the statutory scheme since, by controlling all fills, the administrative officials can determine in individual cases what fills should be permitted and how they may be accomplished.

The Court of Appeals used this delegation to the administrative authorities to limit the statutory prohibitions by the following reasoning: Taking a narrow view of the "work" which the Chief of Engineers might recommend and the Secretary may approve, it reasoned that the deposits in this case could not be authorized and therefore concluded that the deposits are not prohibited. But even assuming the correctness of the court's premise as to the powers of the Secretary of

the Army, the result would simply be that the congressional prohibition was broader than the permission delegated to the administrative authorities and that fills not accomplished by "work", in the court's narrow sense, could not be authorized. That does not justify the strained meaning given the word "fill".

Moreover, an interpretation consistent with the congressional purpose and the legislative history is that all fills, etc., are prohibited, as Congress has explicitly said, and that the authority granted the Secretary of the Army is equally comprehensive. The statute does not say "works" in the sense of the physical thing. It means, we believe, "work" in the broader, generic sense of an activity producing a result.[15] This construction is confirmed by the fact that the statute from which the section was derived (Section 7 of the 1890 Act), rather than providing any limitation to "work", made it unlawful "in any manner to alter or modify the course, location, condition, or capacity of the channel of said navigable water of the United States, unless approved and authorized by the Secretary of War." (See *infra*, pp. 31, 56-57.) In other words, it is the fill that must be authorized, not some works to produce a fill. Here again, the prohibition under the 1890 Act is clear, and, as we have shown, Congress had no intent to relax it in 1899.

Our reading is also supported by the preceding provision of Section 10, where, dealing with structural things like piers, etc., the statute requires approval of "plans" rather than "the work". There is some sug-

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[15] Republic's listing of uses of the plural word "works" (Br. in Opp., p. 18) simply points up the contrast with the term "work" here used.

gestion that the fill resulting from the respondents' deposits in the river was not only unintentional but accidental and unpredictable (R. 2561; Interlake Br. in Opp., p. 6). We need not explore the extent to which, if at all, such factors would excuse violations of the statute because it is clear from the court's findings and the whole history of the Calumet River that the effect on the river of discharge of industrial wastes from iron or steel mills is well-known, foreseeable, and accurately predictable.

B. *The respondents have illegally altered or modified the condition and capacity of the channel.*—Section 10 likewise makes it unlawful "in any manner to alter or modify the course, location, condition, or capacity * * * of the channel." Deposits rendering the channel shallower certainly alter the "condition" and "capacity" of the channel. The Court of Appeals made no specific mention of this prohibition, but the limitation thought to result from the narrow interpretation of the word "work" has the same application here as it had to fills. This Court has already answered any such interpretation in *Sanitary District* v. *United States*, 266 U.S. 405, where, in holding that diversion of water from Lake Michigan was prohibited, it said (p. 429): "There is neither reason nor opportunity for a construction that would not cover the present case. As now applied it concerns a change in the condition of the Lakes and the Chicago River * * *." Elsewhere in the opinion (p. 427) the court emphasized the fact that the suit was not for the purpose of doing away with the channel by which the diversion was accomplished but was "solely for the purpose of limiting the amount of water to be taken through it from Lake Michigan." The re-

spondents' discussion (Interlake Br. in Opp., p. 16) of the works of the Sanitary District is thus irrelevant to the issue there decided. We submit that filling in the channel of the Calumet is just as much a change of condition as the withdrawal of water from the Great Lakes and the Chicago River. And the decision in *Wisconsin* v. *Illinois*, 278 U.S. 367, is inconsistent with a narrow view of the authority of the executive agency since this Court sustained the power to permit diversion of water from the Great Lakes, without more. The permit made no mention of works.

C. *Respondents' actions constitute an illegal deposit of refuse matter in the channel.*—It was the long-standing adminstrative construction, concurred in by the House Committee in its 1954 report, that the deposits here violated the provisions of Section 13 of the 1899 Act:

> That it shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; * * *.

Here again, Congress used broad, all-inclusive language encompassing "any refuse matter of any kind or description whatever." The Court of Appeals, how-

and of administrative authority, broadly construed the exception "other than that flowing from streets and sewers and passing therefrom in a liquid state." In a sense, the companies discharge the waste product through "sewers." But that product, which is a solid, even though small, of rock or metallic nature does not fit the definition of a "liquid state." The statute seems clearly to use "sewers" in the sense of pipes discharging what is normally defined as sewage. Illustrative of the distinction is *Sanitary District of Chicago* v. *Chicago Packing Co.*, 241 Ill. App. 288 (not involving the Rivers and Harbors Act), where the court drew a distinction between sewage in the usual sense and waste products from the meat packers at the Chicago Stock Yards, consisting of garbage, bones, parts of dead animals and other solid matter.

The exception of Section 13 of the 1899 Act applied, not to solids carried by liquids, but to refuse "in a liquid state."[16] Like the other parts of the Act, this section was simply a codification of existing law. The expression "refuse matter of any kind or description" was substituted for "ballast, refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid or any other matter of any kind." See Appendix B, *infra*, p. 60. This history precludes a conclusion that any waste product

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[16] One of the respondents (Interlake Br. in Opp., pp. 7-8, 14-15) seems to go much further than the Court of Appeals by suggesting that the exception "flowing from streets and sewers ar— passing therefrom in a liquid state" exempts them not only from Section 13 of the Act but from the entire Act, including the basic prohibition against obstructions, as well as the specific prohibitions against fills and against alterations of a navigable channel. There is nothing in the statutory language, congressional purpose, legislative history, or administrative construction to warrant such emasculation of the Act.

of a mill could be discharged so long as it was transported by water through a sewer pipe. Such a construction would read out of the statute the second limitation "and passing therefrom in a liquid state." Though transported by vast quantities of water, it cannot be denied that the flue dust and other materials here involved are "industrial solids," as the findings state.[17] A construction that such solids were within the exception, merely because they were suspended in water discharged from a sewer pipe, would also very largely destroy the prohibition against deposit of "mud, sand, dredgings [and] sludge" since a permanent discharge of such materials is most often through the medium of permanent pipes which would be within a broad meaning of "sewer".

The court below stated that the fact that few communities provided for treatment of sewage in 1899 was ground for the belief that Congress did not by Section 13 intend to outlaw the deposit of untreated sewage in navigable waters. R. 2571-2572. The problem of pollution of streams, navigable or non-navigable, has no direct bearing on the present case, which is addressed to the obstruction of navigable capacity. The administrative position that such obstructions are forbidden, whether they result from sewage or otherwise, is clear from the 1913 report (H. Doc. No. 237, *supra*, p. 26), where the District Engineer said (p. 77):

> Practically the entire sewage and other waste of the Calumet region is deposited in the Calumet

[17] Respondents and the court below place great emphasis on the fineness of the solid materials and Interlake says much of it "is so fine that it will never settle out" (Br. in Opp., p. 5). We are not concerned with material which is not deposited in the channel. We only object to that which is deposited. The statute makes no

River and its tributaries—the Grand Calumet and the Little Calumet. It would be difficult at the present time to enforce section 13 of the act of March 3, 1899, but when the Sanitary District completes the Sag Channel it should be required to maintain at its own expense the projected depth of 21 feet in the Calumet River.[18]

As the use of petroleum increased, oil pollution became a problem. Legislation to prevent oil pollution was suggested in 1922, the recommendation stating that the 1899 Act sufficiently covered physical impediments to navigation but did not reach oil (S. Rept. No. 901, 67th Cong., 2d Sess., Cong. Doc. Ser. No. 7951). A House report in the same Congress proposed an amendment to Section 13 of the 1899 Act to deal with oil pollution. H. Rept. No. 1569, 67th Cong., 4th Sess., Cong. Doc. Ser. No. 8158. In the next Congress, the Senate Committee reported a bill dealing with coastal waters only and setting special oil pollution regulations, rather than amending the 1899 Act. S. Rept. No. 66, 68th Cong., 1st Sess., Cong. Doc. Ser. No. 8220. This resulted in the Oil Pollution Act of 1924, 43 Stat. 604, 33 U.S.C. 431-437. In 1926, a comprehensive report on pollution of navigable waters was made pursuant to the 1924 Act. H. Doc. No. 417, 69th Cong., 1st Sess., Cong. Doc. Ser. No. 8579. This report stated that the 1899 Act had been reasonably effective in preventing the discharge of materials such as would form a physical obstruction to navigation. References were made

[18] The Sag Channel was the means whereby the flow of the river was reversed. A 1910 permit authorized the diversion of 2,852 cubic feet per second to be deducted from the authorized

to shoaling, including the Calumet, and the report said that such necessary dredging was attended to by local authorities (pp. 9, 16, 18, 25). The report recommended extension of the Oil Pollution Act to the Great Lakes, their harbors and channels. This report at pages 11-17 itemizes the result of a survey of at least all the principal waterways of the country. That detailed report confirms the conclusion (pp. 8-9) that:

> Except in isolated and unimportant instances the pollution of waters by domestic sewage and industrial wastes does not directly interfere with commerce or commercial navigation. In some instances the organic solid matter in sewage and wastes causes temporary shoaling in the vicinity of the point of discharge, but in most cases of this kind nature eventually decomposes this organic matter and rectifies the condition. In a few instances, where large quantities of sewage are discharged into sluggish and restricted waters, overpollution results and the oxygen content remains insufficient to enable nature to break up the solids. In such cases permanent shoaling in the vicinity of the point of discharge results and dredging must be resorted to. As a rule such dredging is well attended to by municipal authorities.

This is the complete answer to Interlake's argument that our construction would produce "disastrous" results and "would have outlawed the method universally used for the deposit of such wastes" (Br. in Opp., pp. 11-12. The law (Appendix A, *infra*, p. 49) specifically authorizes the Secretary of the Army to permit deposits of materials which will not injure navigation;

wastes here, which cause permanent obstructions to navigation.

Again in 1936, commenting on a proposal to amend Section 13 of the 1899 Act as well as Section 3 of the Oil Pollution Act, the War Department said that Section 13 had proved reasonably effective to prevent the discharge of such material "as would form a physical obstruction to navigation" but that means other than the suggested amendment of Section 13 should be used to deal with the problem of pollution from sewage, etc. (see Appendix C, *infra*, pp. 85-86). The administrators have thus been very hesitant to deal with pollution as part of the obstruction problem, but they have continually insisted that any physical obstruction to navigable capacity must be removed.[19]

We note the apparent theory of the court below (R. 2574) that a single act cannot violate more than one prohibition of the statute and hence that a holding that Section 13 was violated necessarily means Section 10 was not.[20] There is neither reason nor authority for the view that the various prohibitions are mutually

[19] This separation of the problem of pollution and obstruction is evident in the Federal Water Pollution Control Act, 62 Stat. 1155, as amended by Water Pollution Control Act Amendments of 1956, 70 Stat. 498, 33 U.S.C. (Supp. V) 466-466k, Section 12 of which states that it is not to be construed as affecting or impairing Sections 13 through 17 of the Act of 1899. This provision of the Act apparently stems from a letter from the Secretary of War, Hearings, Subcommittee of the Senate Committee on Public Works, S. 418, 80th Cong., 1st Sess. (1947), p. 13, which states that the new pollution statute "would not appear to affect the administration" of these sections. The federal antipollution policy is implemented through cooperation between the Department of Health, Education, and Welfare (rather than the Department of the Army) and local authorities.

[20] The opinion criticizes the United States for not taking a "fra-

exclusive. A deposit of mud in a river by a hydraulic process creating a breakwater or jetty would at the same time seem to be (1) a fill, (2) altering the condition or capacity of the channel, (3) creating an obstruction, and (4) the deposit of refuse matter in the river—thus violating all four provisions here invoked by the United States. That, in our view, is this case. The only difference is that the refuse is industrial solids and is in a somewhat greater stage of dilution than would normally be the case in hydraulic dredging.

III

The United States Is Entitled to Injunctive Relief or, if That Be Denied, Damages

The Court of Appeals alternatively "as a matter of precaution" held that the United States was not entitled to injunctive relief and directed that the complaint should be dismissed even if violations were shown because Congress has "by strong implication excluded the same" (R. 2574). The conclusion that Congress undertook to protect navigation without providing authority to require the removal of illegal obstructions is plainly wrong for several reasons:

A. *The United States is entitled to injunctive relief*

1. Section 12 of the Rivers and Harbors Act of 1899 (33 U.S.C. 406, Appendix A, *infra*, pp. 47-48) provides specific authority for an injunction. That section first provides criminal penalties for violation of the preceding three sections, including Section 10 here involved, and then adds:

> And further, the removal of any structures or parts of structures erected in violation of the

provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States.

The court below reads this provision as applying solely to "any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures", the terms contained in clause 2 of Section 10, thus by implication denying similar injunctive relief with respect to other obstructions. (R. 2574-2575.) However, it would make no sense to authorize the power to require the removal of wooden, concrete or steel obstructions but to withhold similar authority with respect to embankments made by the deposit of loose materials. If the purpose of the statute is to be considered, it is only reasonable that the authority to seek an injunction should apply to all obstructions.[21]

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[21] A similar argument was advanced by the United States in *Sanitary District* v. *United States*, 266 U.S. 405, which is summarized at 421-422, as follows:

> Section 12 of the Act of March 3, 1899, is sufficient authority for this suit. *Economy Light Co.* v. *United States*, 256 Fed. 792, 793; s. c. 256 U.S. 113.
>
> Congress intended by the Act of March 3, 1899, to extend, not to limit, the scope of federal control over obstructions and modifications of the navigable capacity of navigable waters.
>
> In the Act of 1890, § 10 provided that injunction proceedings might be instituted to enjoin obstructions. Section 12 of the Act of 1899 was intended to have a broader scope and to cover all structures in violation of §§ 9, 10, 11, whether the structures amounted to, or caused, obstructions, or were merely unlawful modifications of the condition of a navigable water, not amounting to obstructions.

See also the Brief for the United States filed in the same case (No. 161, Oct. Term 1924), pp. 285-297.

The court's conclusion rests entirely on a change of language occurring at the time the laws were codified. Section 10 of the 1890 Act provided that "the creating or continuing of any unlawful obstruction * * * may be prevented and such obstruction may be caused to be removed by the injunction of any circuit court." (Appendix A, *infra*, p. 46.) Section 12 of the 1899 Act, codifying the enforcement provisions applicable to Sections 9, 10 and 11, provided that "the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any circuit court." The change from the word "obstruction" to the phrase "structures or parts of structures" was not, we believe, significant as far as the present case is concerned. The change of wording appears to have resulted merely from rephrasing the statutes without intending to limit the administrative powers to execute the congressional intent. "Structures" should, in our view, be read to mean any permanent obstruction, rather than some narrower term, limited to buildings or things constructed of wood or other materials. Certainly, a breakwater created by placing dirt or mud between piles would be a structure. The same result can be obtained by using the natural action of spring floods carrying silt, producing a dike which is just as clearly a structure.[22] So here, the natural consequence of the companies' actions was to create what would become a dike if the fill were allowed to continue up to the water surface.

The negative implication that Congress intended to change existing law and to deny remedies for illegal acts is contradicted by the legislative history and by

[22] In the Mississippi basin, the river current is frequently used

the contrary decisions cited above, *supra*, pp. 20-25. The present decision, so far as we know, stands alone in attributing to Congress the intention of declaring particular acts illegal, but denying the normal remedy to correct the consequences of these acts.

2. The decision of this Court in *Sanitary District* v. *United States*, 266 U.S. 405, is controlling here. The arguments of counsel in that case show that it was contended that the district court lacked jurisdiction because "The Attorney General, under the Act of March 3, 1899, is only authorized to institute suits for the removal of structures" (266 U.S. at p. 408). The Solicitor General contended that the right to injunctive relief rested on Section 12, which was intended to have broader scope than the 1890 Act, and that "Independently of § 12, there is sufficient authority for the instant suit" (266 U.S. at pp. 421-422). After stating (p. 425) that the United States "has a standing in this suit not only to remove obstruction to interstate and foreign commerce, the main ground, which we will deal with last, but also to carry out treaty obligations to a foreign power," the Court disposed of the jurisdictional objection with the single sentence (266 U.S. at p. 426): "The Attorney General by virtue of his office may bring this proceeding *and no statute is necessary to authorize the suit. United States* v. *San Jacinto Tin Co.*, 125 U.S. 273." (Emphasis added.) Another application of this general authority to protect navigable waters is *New York* v. *New Jersey*, 256 U.S. 296, where this Court sustained the right of the United States to intervene seeking an injunction against the deposit of sewage in New York Harbor by New Jersey which would result in filling and shoaling the channels, to the detriment of navigation; would render the waters unsightly and un-

shores of the harbor. The opinion clearly contemplated that, except for a stipulation with New Jersey, the requested injunction would, upon proof of the allegations, have been granted.[23]

The courts have recognized the authority of the Attorney General to seek an injunction against illegal interference with commerce. *In re Debs*, 158 U.S. 564; *North Bloomfield Gravel Mining Co.* v. *United States*, 88 Fed. 664 (C.A. 9). In *United States* v. *Ingram*, 203 F. 2d 91, 97 (C.A. 8), a deviation from plans as to a bridge over navigable waters, contrary to statute, was enjoined on the ground that the violation would thwart "the public policy which Congress has made applicable thereto, against which the Government is inherently entitled to seek protection through a writ of injunction. Cf. Griffin v. United States, 8 Cir., 168 F. 2d 457, 459; Economy Light & Power Co. v. United States, 256 U.S. 113, 124, 41 S.Ct. 409; 65 L.Ed. 847." Even private parties may enjoin illegal deposits in navigable streams and obtain a mandatory injunction to compel dredging. *Converse* v. *Portsmouth Cotton Oil Refining Corp.*, 281 Fed. 981 (C.A. 4), certiorari denied, 260 U.S. 724. Moreover, Section 17 of the Act (Appendix A, *infra*, pp. 50-51) grants to the Department of Justice general authority to "conduct the legal proceedings necessary to enforce" the Act. This section lends congressional support to the inherent power recognized by the court.

In addition, general equitable principles support the award of both prohibitory and mandatory injunctions in the present case.[24] While no express finding of fact was

[23] The circumstance that the United States was an intervenor rather than plaintiff in its own action has no legal significance in this context. (Cf. R. 2578.)

[24] Authority for the proposition that reliance in the trial court on

made that the remedy at law was inadequate, it is clear that there is a continuous violation of law. Equitable relief is clearly appropriate to prevent a multiplicity of suits. *Archer* v. *Greenville Gravel* Co., 233 U.S. 60, 65; 1 Pomeroy, *Equity Jurisprudence* (5th ed. 1941), Sec. 253, pp. 501-505. And the undisputed facts plainly show that the remedy at law by an action for damages is inadequate.

B. *The United States is entitled to damages representing the cost of dredging.*

We think the right of the United States to an injunction compelling removal of past deposits and granting a restraint against future deposits without providing for satisfactory conditions for removal was improperly denied by the court below.[25] But, if the appellate court's conclusion that that remedy for violation of the statutory prohibition was not available is affirmed, the Court should under Rule 54(c), F.R.Civ.P.,[26] remand for proof of damages, which would be the cost of dredging the channel to restore navigation, rather than dismiss the complaint. This is so because the requirement to bring a new action for damages would either (1) unwarrantedly penalize the United States simply because

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eral equitable principles is found in the *Sanitary District* case where the Court said that reliance on the 1899 Act in the bill "does not exclude a reliance upon more general principles if they were needed in order to maintain it" (p. 424).

[25] The fact that the trial court's injunction merely refers to the Chief of Engineers and omits mention of his superior, the Secretary of the Army, if error at all, is certainly non-prejudicial to respondents and can easily be cured by amending the decree. Cf. International Br. in Opp., fn. 1, p. 6.

[26] In pertinent part Rule 54(c), F.R. Civ. P., provides:

> * * * Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the

it did not seek that relief, if the present judgment should be held to be *res judicata*, or (2) would require a multiplicity of suits for no just cause if the dismissal is considered to be without prejudice to a damage action. Either view would be contrary to the fundamental policy of the federal rules to accord litigants the relief to which they are entitled in one form of action. Cf. *United States* v. *93.970 Acres of Land*, 360 U.S. 328.

Once it is established that the deposit of the industrial wastes was wrongful, the right of the United States to recover the expense of removing the obstruction so caused can hardly be in doubt. As is pointed out, *supra*, pp. 3-4, the Calumet River is a navigable waterway and the United States has, since 1933, undertaken to maintain a channel with a minimum depth of twenty-one feet. If the respondents do not, either voluntarily or under the impetus of an injunction, remove the obstruction, the Corps of Engineers will presumably have to do so. While dredging of rivers and harbors is customarily financed by congressional appropriation, here, where the necessity of the work can be directly traced to the unlawful acts of the particular respondents, it is appropriate that they should stand the cost of what is in fact one of their operating expenses, disposal of industrial wastes.

Although the particular issue of damages for such illegal action has not been before the Court, it has not been inhospitable to awarding damages where illegal action has resulted in expense or injury either to the United States or to third parties. Cf. *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 411; *Porter*

v. *Warner Co.*, 328 U.S. 395.[27] The situation here is to be distinguished from that where the illegal act impinges only indirectly on the federal government, as in *United States* v. *Standard Oil Company of California*, 332 U.S. 301. It is hard to picture a more direct injury than the dumping of wastes into a channel which the United States is undertaking to maintain clear of obstruction.

CONCLUSION

For the foregoing reasons the decision below should be reversed.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

PERRY W. MORTON,
Assistant Attorney General.

ROGER P. MARQUIS,
HUGH NUGENT,
Attorneys.

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[27] The situation is analogous to the right recognized in the United States to sue for breach of contract, even where that right is not specifically recognized by statute. "It would be strange, to deny them [*i.e.*, the United States] a right which is secured to every citizen." *Dugan* v. *United States*, 3 Wheat. 172, 181. *Cotton* v. *United States*, reasserted the classic principle that "as a corporation or body politic [the United States] may bring suits to enforce their contracts and protect their property." *Cotton* v. *United States*, 11 How. 229, 231-232.

APPENDIX A

Section 10 of the Rivers and Harbors Act of September 19, 1890, 26 Stat. 426, 454, provides:

> SEC. 10. That the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited. The continuance of any such obstruction, except bridges, piers, docks and wharves, and similar structures erected for business purposes, whether heretofore or hereafter created, shall constitute an offense and each week's continuance of any such obstruction shall be deemed a separate offense. Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, or who shall violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court, the creating or continuing of any unlawful obstruction in this act mentioned may be prevented and such obstruction may be caused to be removed by the injunction of any circuit court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney-General of the United States.

Section 10 of the Rivers and Harbors Act of March 3, 1899, 30 Stat. 1121, 1151, as amended, 33 U.S.C. 403, provides:

> Sec. 10. That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

Section 12 of the Rivers and Harbors Act of March 3, 1899, 30 Stat. 1121, 1151-1152, as amended, 33 U.S.C. 406, provides:

> Sec. 12. That every person and every corporation that shall violate any of the provisions of sections nine, ten, and eleven of this Act, or any rule or regulation made by the Secretary of the Army in pursuance of the provisions of the said section fourteen, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished

by a fine not exceeding twenty-five hundred dollars nor less than five hundred dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney-General of the United States.

Section 13 of the Rivers and Harbors Act of March 3, 1899, 30 Stat. 1121, 1152, as amended, 33 U.S.C. 407, provides:

Sec. 13. That it shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or

may be impeded or obstructed: *Provided,* That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further,* That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.

Section 16 of the Rivers and Harbors Act of March 3, 1899, 30 Stat. 1121, 1153, as amended, 33 U.S.C. 411, 412, provides:

Sec. 16. That every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections thirteen, fourteen, and fifteen of this Act shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding twenty-five hundred dollars nor less than five hundred dollars, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction. And any and every master, pilot, and

capacity, respectively, on board of any boat or vessel who shall knowingly engage in towing any scow, boat, or vessel loaded with any material specified in section thirteen of this Act to any point or place of deposit or discharge in any harbor or navigable water, elsewhere than within the limits defined and permitted by the Secretary of the Army, or who shall willfully injure or destroy any work of the United States contemplated in section fourteen of this Act, or who shall willfully obstruct the channel of any waterway in the manner contemplated in section fifteen of this Act, shall be deemed guilty of a violation of this Act, and shall upon conviction be punished as hereinbefore provided in this section, and shall also have his license revoked or suspended for a term to be fixed by the judge before whom tried and convicted. And any boat, vessel, scow, raft, or other craft used or employed in violating any of the provisions of sections thirteen, fourteen, and fifteen of this Act shall be liable for the pecuniary penalties specified in this section, and in addition thereto for the amount of the damages done by said boat, vessel, scow, raft, or other craft, which latter sum shall be placed to the credit of the appropriation for the improvement of the harbor or waterway in which the damage occurred, and said boat, vessel, scow, raft, or other craft may be proceeded against summarily by way of libel in any district court of the United States having jurisdiction thereof.

Section 17 of the Rivers and Harbors Act of March 3, 1899, 30 Stat. 1121, 1153, as amended, 33 U.S.C. 413, provides:

Sec. 17. That the Department of Justice shall conduct the legal proceedings necessary to enforce

the foregoing provisions of sections nine to sixteen, inclusive, of this Act; and it shall be the duty of United States attorneys to vigorously prosecute all offenders against the same whenever requested to do so by the Secretary of the Army or by any of the officials hereinafter designated, and it shall furthermore be the duty of said United States attorneys to report to the Attorney-General of the United States the action taken by him against offenders so reported, and a transcript of such reports shall be transmitted to the Secretary of War by the Attorney-General; and for the better enforcement of the said provisions and to facilitate the detection and bringing to punishment of such offenders, the officers and agents of the United States in charge of river and harbor improvements, and the assistant engineers and inspectors employed under them by authority of the Secretary of the Army, and the United States collectors of customs and other revenue officers, shall have power and authority to swear out process, and to arrest and take into custody, with or without process, any person or persons who may commit any of the acts or offenses prohibited by the aforesaid sections of this Act, or who may violate any of the provisions of the same: *Provided*, That no person shall be arrested without process for any offense not committed in the presence of some one of the aforesaid officials; *And provided further*, That whenever any arrest is made under the provisions of this Act, the person so arrested shall be brought forthwith before a commissioner, judge, or court of the United States for examination of the offenses alleged against him; and such commissioner, judge, or court shall

proceed in respect thereto as authorized by law in case of crimes against the United States.

Section 20 of the Rivers and Harbors Act of March 3, 1899, 30 Stat. 1121, 1154-1155, as amended, 33 U.S.C. 415 (see Note, 33 U.S.C. 416), provides:

> Sec. 20. That under emergency, in the case of any vessel, boat, water craft, or raft, or other similar obstruction, sinking or grounding, or being unnecessarily delayed in any Government canal or lock, or in any navigable waters mentioned in section nineteen, in such manner as to stop, seriously interfere with, or specially endanger navigation, in the opinion of the Secretary of the Army, or any agent of the United States to whom the Secretary may delegate proper authority, the Secretary of the Army or any such agent shall have the right to take immediate possession of such boat, vessel, or other water craft, or raft, so far as to remove or to destroy it and to clear immediately the canal, lock, or navigable waters aforesaid of the obstruction thereby caused, using his best judgment to prevent any unnecessary injury; and no one shall interfere with or prevent such removal or destruction: *Provided*, That the officer or agent charged with the removal or destruction of an obstruction under this section may in his discretion give notice in writing to the owners of any such obstruction requiring them to remove it: *And provided further*, That the expense of removing any such obstruction as aforesaid shall be a charge against such craft and cargo; and if the owners thereof fail or refuse to reimburse the United States for such expense within thirty days after notification, then the officer or agent aforesaid may sell the craft or cargo, or any

part thereof that may not have been destroyed in removal, and the proceeds of such sale shall be covered into the Treasury of the United States.

Such sum of money as may be necessary to execute this section and the preceding section of this Act is hereby appropriated out of any money in the Treasury not otherwise appropriated, to be paid out on the requisition of the Secretary of the Army.

That all laws or parts of laws inconsistent with the foregoing sections ten to twenty, inclusive, of this Act are hereby repealed: *Provided,* That no action begun, or right of action accrued, prior to the passage of this Act shall be affected by this repeal.

APPENDIX B

LEGISLATIVE HISTORY OF SECTIONS 10, 12, 13, 16 and 17 OF THE ACT OF MARCH 3, 1899, 30 STAT. 1121, 1151-1153.

The Act of March 3, 1899, was a general rivers and harbors appropriations act to which were added several sections—Sections 9 through 20—of general legislation on navigable waters. This general legislation had been drafted in accordance with the Act of June 3, 1896, 29 Stat. 202, 234, by which Congress had directed the Secretary of War to make a compilation of existing general laws on navigable waters and to make recommendations as to the revision of these laws.[1] The

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[1] Sec. 2 of the Act of June 3, 1896, reads as follows: "That the Secretary of War is directed to cause to be prepared a compilation of all general laws that have been enacted from time to time by Congress for the maintenance, protection, and preservation of the navigable waters of the United States which are now in force, and to submit the same to Congress at its session in December next, together with such recommendation as to revision, emendation, or enlargement of the said laws as, in his judgment, will be advantageous to the public interest."

Secretary subsequently submitted to Congress a report, H. Doc. No. 293, 54th Cong., 2d Sess. (1897), Cong. Doc. Ser. No. 3534, which included the existing laws and a draft of a bill (the Proposed Act) which purportedly codified the existing law. Though this Proposed Act was submitted to Congress in 1897, it was not acted upon until 1899. In 1899, when the rivers and harbors appropriations were being considered by the Senate, Senator Frye, Chairman of the Commerce Committee, sent the Corps of Engineers a note suggesting that if they had anything special they wanted in the bill they should send it to him at once. The Engineers sent back the Proposed Act and Senator Frye presented it to the Senate as an amendment to the appropriations bill. 32 Cong. Rec., pt. 3, pp. 2296-2298.

Senator Frye introduced the amendment on the floor of the Senate with this statement (*id.*, p. 2296): "By an act of Congress approved June 3, 1896, the War Department was instructed to codify the laws touching rivers and harbors. We have passed laws in each river and harbor act, and they are scattered from the beginning of the Revised Statutes through to the end, and some of them are a little bit crude. The War Department have attended to that work and reported to the House. Now, they have placed in our hands all but two sections of the law, and they are contained in this bill, with some very few amendments to make the laws more certain. There has been some contention about the laws hitherto, the Attorneys-General disagreeing.

"This amendment of three pages which I now offer is the result of their work. As it is all contained in the Revised Statutes, I do not see any necessity of reading this long amendment. It was referred to a subcommittee of the Committee on Commerce, and they examined it very carefully and found it to be entirely correct

and in accord with the statutes now in existence, only scattered, as I said before, from the beginning of the statutes down through to the end, with some brief amendments, in order to make the meaning of the statutes more clear. So I ask that this amendment may be inserted. I do not think there is any necessity of reading it. It is only these sections of the Revised Statutes codified."

The brief debate which followed concerned not the substance of the amendment but only whether or not it should be read to the Senate. After further assurances by Senator Frye that the amendment effected no material change in existing law, that the only changes had been slight changes to remove ambiguities, and that the Commerce Committee had carefully considered the amendment, the Senate passed the amendment. Because of disagreements between the Senate and the House over some of the appropriations made, a joint conference was appointed to resolve these differences. The only other significant reference to the amendment was in a statement by the House conferees accompanying the conference report on the bill. This statement concluded with this sentence (*id.*, p. 2923): "The bill as now agreed upon and presented also includes a codification of existing laws pertaining to rivers and harbors, though containing no essential changes in the existing law." The bill was enacted into law with no specific discussion in either house of the contents of this amendment.

A comparison of the Proposed Act and the prior existing law is necessary to determine what changes were made by the Proposed Act. Sec. 10 of the Act of 1899 had been Sec. 2 of the Proposed Act, which in turn had been made up of parts of Sections 10 and 7 of the Act of September 19, 1890, 26 Stat. 426, 454. A

comparison of these Acts will show what was carried over into the subsequent Act and what was omitted:

Sec. 10 of the Act of 1899 (Sec. 2 of the Proposed Act):

That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited;

and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.

Sec. 10 of the Act of 1890:

That the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited. • • •

Sec. 7 of the Act of 1890:

That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind outside established harbor-lines, or in any navigable waters of the United States where no harbor-lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters, and it shall not be lawful hereafter to commence the construction of any bridge, bridge-draw, bridge piers and abutments, causeway or other works over or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of the channel of said navigable water of the United States, unless approved and authorized by the Secretary of War: *Provided*, That this section shall not apply to any bridge, bridge-draw, bridge piers and abutments the construction of

> which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, draw bridge, bridge piers and abutments, or other works, under an act of the legislature of any State, over or in any stream, port, roadstead, haven or harbor, or other navigable water not wholly within the limits of such State.[2]

The only difference between Sec. 10 of the Act of 1899 and Sec. 2 of the Proposed Act was that the word "Congress" was substituted for the word "law" in the phrase "not affirmatively authorized by Congress." There is nothing specific in the legislative history to show where or why this change was made. But see *supra*, p. 22.

Sec. 10 of the 1890 Act had, it will be noted, *infra*, p. 58, provisions for its enforcement within itself. Sec. 7 did not, the only provisions for its enforcement being in the general enforcement section, Sec. 11. The sanctions from Sec. 10 were placed in Sec. 12 of the 1899 Act (Sec. 4 of the Proposed Act), while Sec. 11 became Sec. 17 of the 1899 Act (Sec. 9 of the Proposed Act). The following comparisons of these Acts will show what changes were made. One change in particular is to be noted, the change of "obstruction" in Sec. 10 of the 1890 to "structure" in Sec. 12 of the 1899 Act. No explanation for this change appears in the War Department's letter accompanying the Proposed Act nor at any other point in the legislative history.

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[2] This section was amended by Sec. 3 of the Act of July 13, 1892, 27 Stat. 88, 110, so that the limitations on excavations and fills applied to "any port, roadstead, haven, harbor, harbor of refuge, or inclosure within the limits of any breakwater" as well as to "the channel of any navigable water of the United States."

Sec. 12 of the Act of 1899 (Sec. 4 of the Proposed Act):

That every person and every corporation that shall violate any of the provisions of sections nine, ten, and eleven of this Act, or any rule or regulation made by the Secretary of War in pursuance of the provisions of the said section fourteen, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding twenty-five hundred dollars nor less than five hundred dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any circuit court exercising jurisdiction in any district in which such structures may exist; and proper proceedings to this end may be instituted under the direction of the Attorney-General of the United States.[3]

Sec. 10 of the Act of 1890:

• • • The continuance of any such obstruction, except bridges, piers, docks and wharves, and similar structures erected for business purposes, whether heretofore or hereafter created, shall constitute an offense and each week's continuance of any such obstruction shall be deemed a separate offense. Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, or who shall violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court, the creating or continuing of any unlawful obstruction in this act mentioned may be prevented and such obstruction may be caused to be removed by the injunction of any circuit court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney-General of the United States.

[3] An oversight by the Joint Conference Committee in the renumbering of the sections resulted in a reference in Sec. 12 to "any rule or regulation made by the Secretary of War in pursuance of the provisions of the said section fourteen." The section "fourteen" referred to had been renumbered as Sec. 11 by the Conference and the reference should be to Sec. 11. 32 Cong. Rec. pt. 3, p. 2816 (1899).

Sec. 17 of the Act of 1899 (Sec. 9 of the Proposed Act):

That the Department of Justice shall conduct the legal proceedings necessary to enforce the foregoing provisions of sections nine to sixteen, inclusive, of this Act; and it shall be the duty of district attorneys of the United States to vigorously prosecute all offenders against the same whenever requested to do so by the Secretary of War or by any of the officials hereinafter designated, and it shall furthermore be the duty of said district attorneys to report to the Attorney-General of the United States the action taken by him against offenders so reported, and a transcript of such reports shall be transmitted to the Secretary of War by the Attorney-General; and for the better enforcement of the said provisions and to facilitate the detection and bringing to punishment of such offenders, the officers and agents of the United States in charge of river and harbor improvements, and the assistant engineers and inspectors employed under them by authority of the Secretary of War, and the United States collectors of customs and other revenue officers, shall have power and authority to swear out process and to arrest and take into custody, with or without process, any person or persons who may commit any of the acts or offenses prohibited by the aforesaid sections of this Act, or who may violate any of the provisions of the same: *Provided*, That no person shall be arrested without process for any offense not committed in the presence of some one of the aforesaid officials: *And provided further*, That whenever any arrest is made under the provisions of this Act, the person so arrested shall be brought

Sec. 11 of the Act of 1890:

That it shall be the duty of officers and agents having the supervision, on the part of the United States, of the works in progress for the preservation and improvement of said navigable waters, and, in their absence, of the United States collectors of customs and other revenue officers to enforce the provisions of this act by giving information to the district attorney of the United States for the district in which any violation of any provisions of this act shall have been committed: *Provided*, That the provisions of this act shall not apply to Torch Lake, Houghton County, Michigan.

commissioner, judge, or court of the United States for examination of the offenses alleged against him; and such commissioner, judge, or court shall proceed in respect thereto as authorized by law in case of crimes against the United States.

Sec. 13 of the Act of 1899 was originally Sec. 6 of the Act of August 18, 1894, 28 Stat. 338, 363. A comparison of the original section with the later section shows that the later was considerably simplified.

Sec. 13 of the Act of 1899 (Sec. 5 of the Proposed Act):

That it shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided*, That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement

Sec. 6 of the Act of 1894:

That it shall not be lawful to place, discharge, or deposit, by any process or in any manner, ballast, refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any other matter of any kind other than that flowing from streets, sewers, and passing therefrom in a liquid state, in the waters of any harbor or river of the United States, for the improvement of which money has been appropriated by Congress, elsewhere than within the limits defined and permitted by the Secretary of War; neither shall it be lawful for any person or persons to move, destroy, or injure in any manner whatever any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States, in whole or in part, for the preservation and improvement of any of its navigable waters, or to prevent floods, or as boundary marks, tide gauges, surveying stations, buoys, or other established marks;

[The remainder of Sec. 6 became part of Sec. 16 of the Act of 1899. See following page.]

of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further*, That the Secretary of War, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.

An examination of the legislative history of the Act of 1894 throws no light on why the exception of waters flowing from sewers was made, there having been no discussion of the clause in either the reports or the debates on the bill.

Sec. 16 of the Act of 1899 was a collection in one section of the penalties to be levied for violations of Sections 13, 14 and 15. As we have just seen, Sec. 6 of the Act of 1894 became Sec. 13 of the Act of 1899, and it originally included penalties for its violation. Further penalties for violation of Sec. 6 of the Act of 1894 were in Sections 7 and 8 of the same Act.

Sec. 16 of the Act of 1899 (Sec. 8 of the Proposed Act):

That every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections thirteen, fourteen, and fifteen of this Act shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding twenty-five hundred dollars nor less than five

Sec. 6 of the Act of 1894:

• • • [A]ny and every such act is made a misdemeanor, and every person knowingly engaged in or who shall knowingly aid, abet, authorize, or instigate a violation of this section shall, upon conviction, be punishable by fine or imprisonment, or both, such fine to be not less than two hundred and fifty dollars nor more than twenty-five hundred dollars and the imprisonment to be

hundred dollars, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction.

And any and every master, pilot, and engineer, or person or persons acting in such capacity, respectively, on board of any boat or vessel who shall knowingly engage in towing any scow, boat, or vessel loaded with any material specified in section thirteen of this Act to any point or place of deposit or discharge in any harbor or navigable water, elsewhere than within the limits defined and permitted by the Secretary of War, or who shall willfully injure or destroy any work of the United States contemplated in section fourteen of this Act, or who shall willfully obstruct the channel of any waterway in the manner contemplated in section fifteen of this Act, shall be deemed guilty of a violation of this Act, and shall upon conviction be punished as hereinbefore provided in this section, and shall also have his license revoked or suspended for a term to be fixed by the judge before whom tried and convicted.

And any boat, vessel, scow, raft, or other craft used or employed in violating any of the provisions of sections thirteen, fourteen, and fifteen of this Act shall be liable for the pecuniary penalties specified in this section, and in addition thereto for the amount of the damages done by said boat, vessel, scow, raft, or

not less than thirty days nor more than one year, either or both united, as the judge before whom conviction is obtained shall decide, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction of this misdemeanor.

Sec. 7 of the Act of 1894:

That any and every master, pilot, and engineer, or person or persons acting in such capacity, respectively, on board of any boat or vessel who may willfully injure or destroy any work of the United States contemplated in section six of this Act, or who shall knowingly engage in towing any scow, boat, or vessel loaded with any such prohibited matter to any point or place of deposit or discharge in any harbor contemplated in section six of this Act, elsewhere than within the limits defined and permitted by the Secretary of War, shall be deemed guilty of a violation of this Act and shall, upon conviction, be punishable as hereinbefore provided for offenses in violation of section six of this Act, and shall also have his license revoked or suspended for a term to be fixed by the judge before whom tried and convicted.

Sec. 8 of the Act of 1894:

Any boat, vessel, scow, or other craft used or employed in violating any of the provisions of section six and seven of this Act shall be liable to the pecuniary penalties imposed thereby, and in addition thereto to the amount of the damages done by said boat, vessel, scow, or other craft, which latter sum shall be

other craft, which latter sum shall be placed to the credit of the appropriation for the improvement of the harbor or waterway in which the damage occurred, and said boat, vessel, scow, raft, or other craft may be proceeded against summarily by way of libel in any district court of the United States having jurisdiction thereof.

placed to the credit of the appropriation for the improvement of the harbor in which the damage occurred, and said boat, vessel, scow, or other craft may be proceeded against summarily by way of libel in any district court of the United States having jurisdiction thereof.

Finally, the legislative history of the general legislation in the Act of 1890 shows that one of the factors in its adoption was the requirement in *Willamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1, that Congress must assert its power over navigable waters by legislation before the obstruction of navigable streams becomes unlawful. The specific discussion of the *Willamette* case in the Senate included the following remarks (21 Cong. Rec. pt. 9, pp. 8604-8605):

MR. EDMUNDS: Yes; but my friend from Oregon will agree with me that the court has said—and I think probably rightly in point of law—that the assertion of this power must be made by Congress, and that until it does make it the obstruction of a stream is no violation of any law of Congress and not of the common law, because the United States has no common law; and, therefore, if there is anything to stop it, it is only State law.

MR. DOLPH: That is correct.

MR. GRAY: It was for that purpose that the amendment which I understood was introduced by the Senator from Vermont the other day was offered.

MR. EDMUNDS: Exactly. It was reported from our committee after consideration of the subject

Senator Dolph had originally introduced this legislation. He had represented the losing parties in the *Willamette* case and so was plainly fully aware of the implications of the case and of the effect the legislation would have.

APPENDIX C

HISTORY OF ADMINISTRATIVE AND CONGRESSIONAL CONSTRUCTION OF THE ACT OF 1899, ESPECIALLY AS RELATING TO CALUMET RIVER AND HARBOR

To demonstrate that the construction of the Act of 1899 now urged before this Court has always been the construction given the Act by the officials charged with its administration, we here set out in chronological order certain administrative and congressional materials on the enforcement of the Act. The correspondence used here pertains only to Calumet River and Harbor, but the congressional materials refer to the Act generally. Since we are here concerned only with the administrators' interpretation of the Act, we have for the most part not printed the answers to the various letters we set forth nor given a detailed account of the actions taken as a result of these letters. Furthermore, since we do not claim any estoppel against respondents (cf. Interlake Br. in Opp., p. 6), the responses to the Government's letters, either by action or in writing, are irrelevant. However, the complete files have been lodged with the Clerk of this Court, so that the complete correspondence may be examined.

1909

Letter from Chicago District Engineers to Illinois Steel Co.[1]

May 22, 1909

It has been reported to this office that a great deal of solid material is flowing out into Calumet River through your 36 inch sewer pipe passing through the North Pier, and that such material settles in the channel not only at the mouth of the sewer but that it spreads to considerable extent gradually filling up the channel.

You are hereby requested to take some steps to prevent such filling either by suitable and effective screening or by a catch-basin placed in such a manner that it will catch the solids before they reach the mouth of the sewer.

* * * * *

1911

Letter from Illinois Steel Co. to Chicago District Engineers

In answer to questionnaire which had been sent by the Engineers to all dock owners on Chicago and Calumet Rivers. (See H. Doc. 237, 63d Cong., 1st Sess., Cong. Doc. Ser. No. 6542, p. 160.)

February 21, 1911

* * * * *

2. What obstructions or impediments now exist in the navigable waterways at the port of Chicago (Chicago and Calumet Harbor) which affect the movement or shipment of ore, and what improve-

[1] The captions and signatures of all these letters have been omitted.

ments should be made in these navigable waterways?

We do not use the harbor at the mouth of the Chicago River.

The harbor at the mouth of the Calumet River, where the South Chicago plant of the Illinois Steel Co. is located, is too shallow for the ore boats when fully loaded. We are compelled to do dredging every year.

At Gary we have constructed our own slip and also our own docks for the landing of boats for the delivery of ore.

If this question relates to the Calumet River at Gary, we beg to say that we do not consider the river at this place of any importance or very likely to be of any importance for shipping purposes. The slip which we have constructed does not connect with it. One of our companies owns practically all of the land on each side of the river in this neighborhood for a distance of 6 miles and on one side of the river for an additional mile and a half.

It would be to our interest to have the harbor at the mouth of the Calumet River, and the river itself as far as our south slip, dredged to permit use of the same at all times by boats drawing 21 feet of water.

* * * * * *

1913

H. Doc. 237, 63d Cong., 1st Sess., Cong. Doc. Ser. No. 6542

This was a report from the Corps of Engineers to Congress on *Chicago Harbor and Adjacent Waterways.* It included the letter immediately preceding and the

following statement on the condition of the Calumet River (p. 77):

* * * * *

230. There is little natural silt brought into the Calumet River by floods. There is some scouring of the banks in the bends during freshets. Practically the entire sewage and other waste of the Calumet region is deposited in the Calumet River and its tributaries—the Grand Calumet and the Little Calumet. It would be difficult at the present time to enforce section 13 of the act of March 3, 1899, but when the Sanitary District completes the Sag Channel it should be required to maintain at its own expense the projected depth of 21 feet in the Calumet River.

* * * * *

1915

Letter from Great Lakes Dredge & Dock Company of Chicago to Chicago District Engineers

September 27th, 1915

Kindly consider this our formal application for permit to dredge in front of the Blast Furnace sewer outlet of the Illinois Steel Company at South Chicago, Illinois.

The material, consisting of about 5000 cu. yds. of silt and sand, will be placed in dump scows and disposed of in Lake Michigan outside the eight mile limit.

Enclosed please find the necessary blueprints.

1918

Letter from Chicago District Engineers to Illinois Steel Co.

July 6, 1918

There is inclosed herewith blue print of soundings, taken June 28, 1918, at the entrance to Calumet Harbor, Ill. showing a shoal formed directly across the entrance channel. It has been reported to this office that two vessels have grounded on this bar within the last few weeks.

As it is very evident this shoal was formed by the outflow of refuse from your plant immediately above the north pier, it is urged that immediate action be taken by you toward its removal. It is understood that you have a dredge operating in the immediate vicinity at the present time which could be utilized for this purpose.

It is requested that this office be notified as to when work is to be commenced so that an Inspector may be sent to the site of the work.

1920

Letter from Chicago District Engineers to Illinois Steel Co.

October 27, 1920

Inclosed is a blue print of chart showing soundings taken October 21, 1920, in and near the angle between the United States north pier and your lake bulkhead, at South Chicago.

You have for several seasons been dredging, from this locality, the material which was deposited from your sewer, and which in one instance extended well into the entrance channel south of

the pier. Although the sewer outlet has been placed further north than formerly, it is evident that the deposits continue and cause a constant menace to the channel.

It is evident from inspection of the chart that the present shoal extends to the very edge of the channel, and it is extremely probable that if not now removed the shoal will encroach on the channel before spring at the latest.

You are therefore urgently requested to prevent this encroachment by at once removing the deposits from the vicinity of the channel edge, say at least 200 feet northerly therefrom, as is indicated on the chart by the shaded area.

* * * * *

1922

S. Rept. 901, 67th Cong., 2d Sess., Cong. Doc. Ser. No. 7951.

This report accompanied a bill to prevent oil pollution of navigable waters of the United States. The Chief of Engineers had made the following statement before the Committee on Rivers and Harbors:

With regard to the existing law, we do not feel that the act of March 3, 1899, is sufficient to meet the present conditions. That law states that parties shall not discharge or permit to be discharged, etc., materials which will impede or obstruct navigation. Those terms "impede and obstruct" are ordinarily considered as physical impediments to navigation, neither of which oil or acid is.

The Report included the following letter:

Office of the Chief of Engineers

Washington, August 18, 1922

Your letter of July 28, 1922, on the subject of Senate bill No. 3311, to prevent the oil pollution of navigable waters, has received most careful consideration.

Section 13 of the river and harbor act of March 3, 1899, is not applicable to prevent the discharge of oil upon navigable waters, for the prohibition in that paragraph states:

"It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited * * * whereby navigation shall or may be impede or obstructed."

This legislation was enacted at a time before the serious pollution of navigable waterways by oil had occurred or was anticipated. Its essential purpose was to prevent the introduction into navigable channels of the only kind of material which had given trouble to navigation up to that time—that is, such material as would form an actual physical obstruction to navigation. The use of the words "impeded or obstructed" imply a physical hindrance to navigation which does not occur in the case of oil. It is, therefore, not at all likely that the courts would hold that oil, which is a fire menace and a source of destruction of animal and vegetable life in the water rather than an impediment or obstruction to navigation, is refuse matter coming within the scope of the prohibition contained in the law.

It is, therefore, regarded as highly desirable that legislation be so drawn as to be distinctly and clearly applicable as to the discharge of oil. As the Secretary of War pointed out in his letter of March 30 to the chairman of the Committee on Commerce of the Senate, the particular form that the legislation should take is regarded by the department as a matter for Congress in its wisdom to decide.

* * * * *

1923

H. Rept. 1569, 67th Cong., 4th Sess., Cong. Doc. Ser. No. 8158.

This was the House Report on the same bill. It recommended passage of the bill with the following amendment:

That section 13 of the act entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," approved March 3, 1899, be, and is hereby, amended to read as follows:

"Sec. 12. That it shall be unlawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, oil in any form, or any refuse matter of any kind or description whatever *other than ordinary sewage from streets, sewers, or vessels,* into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water. * * * *And provided further,* That the Secretary of War,

whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned, other than oil in any form or oil refuse, in navigable waters within the limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; * * *. [Emphasis added.]

The Report also included a letter[2] from the Secretary of War to the Chairman of the Committee on Rivers and Harbors which contained the following passage:

June 9, 1922

* * * * *

The discharge of oil in the navigable waters has increased to a dangerous extent in recent years, creating at some ports a fire menace of serious character to vessels, wharves, and other shipping facilities. In addition, there has been much complaint that oil has an unsightly and injurious effect on beaches and other shore property, as well as a very serious effect on the food-fish supply of the country. The injurious effect of the discharge of oil to the navigable waters has been particularly noticeable in the larger ports of the country, such as New York and New Orleans, where fires due

[2] Although this letter does not appear in the Report until February of 1923, it was actually written in June 1922, two months before the letter from the Chief of Engineers printed in the Senate Report on the same bill. Between the writing of the two letters, it was brought to the attention of the War Department that a United States District Court in Virginia had held that the discharge of oil from vessels into navigable waters does not fall within the province of Section 13 of the Act of 1899. This fact explains the change in policy reflected in the letters. See S. Rept. 901, 67th Cong., 2d Sess., p. 2.

to floating oil have occurred. The waters of New York are supervised under a special act of Congress (act approved June 29, 1888, 25 Stats. 209), which provides the method of administration and provides penalties for various offenses tending to injure the navigability of the waters of New York Harbor and vicinity. Acting under this law and in cooperation with local interests, much has already been accomplished toward the suppression of the oil menace in the harbor of New York.* * *

The existing general law applicable to such matters is contained in sections 13, 16, and 17 of the river and harbor act of March 3, 1899 (30 Stats. 1152 and 1153). Section 13 provides that it shall not be lawful to discharge or deposit from any vessel or shore establishment "any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water." Section 16 provides reasonable but adequate penalties for violations of said section 13, and section 17 fixes the procedure of enforcement.

The great importance of having an adequate legal provision for dealing with the growing menace of oil pollution in the navigable waters of the United States generally has been recognized by this department for some years, but it has been assumed by the Department that the provisions of section 13 of the act of 1899 were sufficiently broad to include the discharge of oil, although the question has not been definitely determined judicially. It is thought that the amendment of section 13

of the act of 1899 so as to make it apply specifically to oil in any form which may be discharged or deposited in navigable waters may be of material assistance in prohibiting the injurious practice and is very desirable. Such an amendment has, in fact, been recommended by this department several times within the past three years. I accordingly submit a draft of a bill embodying this amendment, and earnestly recommend its favorable consideration by the committee and its enactment by Congress.

During the present Congress, a variety of legislation designed to prevent oil pollution has been proposed, House bills 10238 and 10956 being notable examples. In reply to your request for my comments on these bills, I desire to say that I regard the former as decidedly objectionable. It proposes to amend section 13 of the act of 1899, but in such a way that it will apply to oil only, and if enacted, so much of the existing statute as inhibits the discharge of other kinds of refuse matter into navigable waters will be abrogated, a proposition wholly untenable and which undoubtedly was not intended by the proponent of this bill. Besides, the penalty provision in section 2 of the bill seems unnecessary, as penalties for violation of section 13 of the act of 1899 are already provided in section 16 of the same act. These are considered adequate and reasonable, and it is believed that to double the pecuniary penalty as proposed would add nothing to the effectiveness of the law.

* * * * *

Letter from Chicago District Engineers to Illinois Steel Co.

August 28, 1923

On account of the change which is now being made by this office in Calumet Harbor at the mouth of the Calumet River by the removal of that part of the old United States North Pier which projects eastwardly beyond the east line of the Illinois Steel Company's property, it seems important to call to your attention the desirability of constructing settling basins or providing some other means of intercepting a very considerable amount of solid material which is being deposited in Calumet Harbor along the east front of the company's property by the two sewers of the Illinois Steel Company which empty into Lake Michigan on the east line of the company's property between the mouth of the Calumet River and the Illinois Steel Company's private harbor.

It is realized of course that the company has made a serious effort each year to remove these deposits by dredging and for that reason perhaps no particular harm has been done in the past. However, the removal of about 400 lineal feet of the old North Pier which has heretofore prevented said deposits from extending across the entrance to the Calumet River, by serving as a retaining wall, thereby forming a sort of settling basin just north of the mouth of the River, and in addition the opening of the Calumet Sag Canal by the Chicago Sanitary District, thereby reversing the direction of the current in the Calumet River, will soon change the conditions at the mouth of the River so materially that it seems desirable that your com-

pany should take up this matter with a view to seeing what may be done to prevent these deposits from entering the harbor.

I would appreciate receiving your assurance that a study of this problem will be made by the company with a view to intercepting these deposits as soon as practicable.

1924

S. Rept. 66, 68th Cong., 1st Sess., Cong. Doc. Ser. No. 8220.

This report accompanied a bill to prevent oil pollution of navigable coastal waters. To indicate that there was not sufficient authority under existing law to prevent this oil pollution, the committee reprinted in the report the letter from the Chief of Engineers it had printed in S. Rept. 901, 67th Cong., 2d Sess., *supra*, and a letter, which was enclosed with the Chief of Engineers' letter, reporting the District Court decision mentioned in footnote 2, *supra*, p. 72.

Letter from Chicago District Engineers to Illinois Steel Co.

June 28, 1924

Referring to my letter of August 28, 1923, in reference to the solid material which is being deposited in Calumet Harbor by the two sewers of the Illinois Steel Company which empty into Calumet Harbor on the east line of the company's property north of the mouth of the Calumet River, I am sending you herewith a blue print showing soundings taken near the south sewer outlet on May 27 and 28, 1924. The location of the 21 foot contour, as determined by these soundings, indi-

cates that the deposits from your south sewer have extended beyond the north edge of the channel (line drawn in red) about 130 feet.

In order to restore the project depth in the channel and prevent shoaling from recurring in the near future it is suggested that you make arrangements as soon as convenient to dredge the area shaded in yellow on the accompanying blue print to a depth of 22 feet below Low Water Datum for Lake Michigan. While I am immediately concerned only with the encroachment upon the ship channel, I think it would be to your advantage to dredge the area shaded in yellow rather than a smaller area more frequently.

* * * * *

1926

H. R. Doc. 417, 69th Cong., 1st Sess., Cong. Doc. Ser. No. 8579.

This document gave the results of an investigation authorized by Section 9 of the Oil Pollution Act of 1924 into the general subject of pollution affecting navigation or commerce on the navigable waters of the United States, together with recommendations for remedial legislation. The Corps of Engineers had made the study. On pp. 8 and 9, we find the following statement on the effects of pollution on navigation and commerce:

Navigation or commerce.—Except in isolated and unimportant instances the pollution of waters by domestic sewage and industrial wastes does not directly interfere with commerce or commercial navigation. In some instances the organic solid matter in sewage and wastes causes temporary

> shoaling in the vicinity of the point of discharge, but in most cases of this kind nature eventually decomposes this organic matter and rectifies the condition. In a few instances, where large quantities of sewage are discharged into sluggish and restricted waters, overpollution results and the oxygen content remains insufficient to enable nature to break up the solids. In such cases permanent shoaling in the vicinity of the point of discharge results and dredging must be resorted to. *As a rule such dredging is well attended to by municipal authorities.* [Emphasis added.]

On pp. 11-17 there is a table of navigable waters into which polluting substances are being deposited to such an extent as to endanger or interfere with navigation, commerce, or fisheries. On the Calumet River, domestic sewage, *industrial wastes from steel mills,* chemical plants, refineries, gas plants, etc. (total, 493,520,000 gallons per day) were said to have *caused shoaling,* interfered with pleasure boating, and destroyed fish life (p. 16).

In discussing existing federal laws relating to pollution, the report makes this statement about the Act of 1899 (p. 19):

> * * * Substances flowing from streets and sewers in a liquid state are specifically excepted from the provisions of this law, and in practice it has been found impracticable to control under this law any form of liquid pollution even though it comes from a source other than streets and sewers.

Shortly thereafter, the report distinguishes the Act of 1899 from the Oil Pollution Act of 1924 (pp. 19-20):

> The essential purpose of the act of March 3, 1899, was to prevent the introduction into navigable

waters of such material as would form a physical obstruction to navigation. It has proven reasonably effective in preventing the discharge of such materials. The act to prevent obstructive and injurious deposits within the harbor and adjacent waters of New York City has also proven reasonably effective for the protection of navigation on those waters from serious interference or injury due to the discharge of refuse matter. The oil pollution act, 1924, has had a decidedly beneficial effect in decreasing the amount of oil pollution in the coastal ports and harbors. * * *

1927

Letter from Chicago District Engineers to Illinois Steel Co.

November 19, 1927

Your attention is invited to the very serious shoaling which has occurred in Calumet Harbor east of your property as a result of the solid matter which is being deposited along the east side of your property by the two sewers of your company which discharge into the harbor between the mouth of the Calumet River and your north slip. It has been reported by one of the engineers attached to this office that the depth adjacent to your east bulkhead is only 2 to 3 feet.

If it is practicable for you to remove this material before December 31, 1927, it may be done under the dredging permit which was issued to the Great Lakes Dredge & Dock Company on August 4, 1924, for dredging adjacent to your South Chicago plant.

* * * * *

1928

Letter from Chicago District Engineers to Illinois Steel Co.

May 15, 1928

* * * * *

The soundings taken recently by this office in the entrance to Calumet River between piers, copy of which is inclosed herewith, show that considerable deposits of ore dust have been made over this area from your 4 sewers which empty into the channel through the U. S. north pier.

It is therefore respectfully requested that the area outlined in red on the accompanying map be dredged to a depth of 22 feet, and that the necessary dredged cuts be carried lakeward beyond the end of the north pier sufficiently to restore the project depth.

1931

Letter from Chicago District Engineers to Illinois Steel Co.

May 25, 1931

In your letter of October 28, 1930, it was indicated that the plant for recovering sludge from the lake in front of your South Works would be completed and ready for operation in March or April, 1931.

As this deposit has materially reduced the area back of the breakwater which was intended for use as a harbor of refuge by vessels in stormy weather, it is of great importance that it be removed as early as practicable. Will you please inform me

what progress has been made toward completion of the plant and when it is expected that active work of removing the shoal may be expected to begin.

1932

H. Doc. 494, 72d Cong., 2d Sess., Cong. Doc. Ser. No. 9682.

This document is a report from the Chief of Engineers to the Secretary of War on a preliminary examination and survey of Calumet Harbor and River. The estimated expenditures included (p. 24; also see p. 39):

Dredging a harbor of refuge and entrance channel, as shown on the map, to 26 feet, 3,920,000 cubic yards; plus 2 feet overdepth, 2,580,000 cubic yards; a total of 6,500,000 cubic yards, at 25 cents, based on dipper-dredge operation	$1,625,000
Superintendence, engineering, and contingencies	165,000
Total	1,790,000

(It is assumed, in this estimate, that the shoal adjacent to the outer bulkhead of the Illinois Steel Co. will be removed by that company to the depth of 21 feet originally provided by the United States. The material affected is metallic dust and ore refuse from the mill which is stated by the owners to have a value of $2 a ton.)

In the division engineer's discussion of the outer harbor and entrance channel, the report once again refers to Illinois Steel's obligation to dredge the channel (p. 34):

> 20. Should the existing project be revised to provide for a draft of 24 feet, the outer harbor of refuge and the entrance channel up to the Elgin, Joliet & Eastern Railway bridge should be deepened to 26 feet below low-water datum for Lake Michigan, so as to provide ample bottom clearance for deeply laden vessels anchored in the basin during stormy weather and for those moored at the

docks of the steel companies. That portion of the basin fronting the bulkhead of the Illinois Steel Co. has been filled up with flue dust and other refuse from the steel mills to such an extent that its top surface is above water in many places. This area was originally dredged by the United States to a depth of 21 feet and will have to be restored to that depth by the Steel Co. As the material is stated by the owners to be worth $2 a ton, no difficulty is anticipated on this score.

1935

H. Rept. 424, 74th Cong., 1st Sess., Cong. Doc. Ser. No. 9886, p. 43;

S. Rept. 893, 74th Cong., 1st Sess., Cong. Doc. Ser. No. 9879, p. 43.

Calumet Harbor and River, Ill. and Ind.
(H. Doc. 492,[1] 72d Cong.)

Location, 11½ miles south of Chicago Harbor. Serves the industrial region in the southern part of the city of Chicago. Commerce in normal times averages over 13,000,000 tons annually. The report recommends the construction of new breakwaters and the enlargement of the channels in the harbor and river. Estimated cost, $4,540,000. The Public Works Administration has allotted the sum of $3,492,700 to this project.

[1] This is apparently an error and should read H. Doc. 494. H. Doc. 492 dealt with "Vacancies filled by appointmen of employees of a lower grade."

An Act authorizing the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes, approved August 30, 1935, 49 Stat. 1028, 1036.

Calumet Harbor and River, Illinois and Indiana: House Document Numbered 494, Seventy-second Congress: *Provided*, That no expense shall be incurred by the United States for the acquiring of any lands required for the purpose of this improvement;

1936

H. Rept. 1979, 74th Cong., 2d Sess., Cong. Doc. Ser. No. 9992, p. 24.

Corps of Engineers
Rivers and Harbors

The estimate for rivers and harbors is presented in two amounts, namely:

For preservation and maintenance of existing river and harbor works and other miscellaneous objects other than the prosecution of projects either new or under way	$ 38,677,899
For prosecution of projects heretofore authorized, including waterway improvements undertaken out of allotments of the appropriation "Emergency Relief, 1935-37"	129,000,000
Total	167,677,899

An Act making appropriations for the military and nonmilitary activities of the War Department for the fiscal year ending June 30, 1937, and for other purposes, approved May 15, 1936, 49 Stat. 1278, 1306.

RIVERS AND HARBORS

To be immediately available and to be expended under the direction of the Secretary of War and the supervision of the Chief of Engineers:

For the preservation and maintenance of existing river and harbor works, and for the prosecution of such projects heretofore authorized as may be most desirable in the interests of commerce and navigation; * * *

S. Rept. 2225, 75th Cong., 2d Sess., Cong. Doc. Ser. No. 9989.

This report accompanied a bill relating to deposit of refuse in navigable waters. The bill proposed to amend Sec. 13 of the Act of 1899 and Sec. 3 of the Oil Pollution Act of 1924. The first section of this bill, which did not pass, read as follows:

That section 13 of the Act * * * approved March 3, 1899, as amended, is amended by striking out "other than that flowing from streets and sewers and passing therefrom in a liquid state" and inserting in lieu thereof a comma and the following: "including sludge, [acids,] *corrosive substances and sewage from which the bulk of the suspended and floating matter has not been removed* and sewage in a liquid state as well as other matter".

When asked for its opinion of the bill, the War Department answered, in part, as follows:

April 20, 1936

* * * * *

The Department appreciates the advisability of steps being taken by the Federal Government to reduce and control in some measures the pollution now incurred in the waterways of the Nation, but it does not believe that the provisions of this act will accomplish the purpose. Section 13 of the act of March 3, 1899, prohibits the discharge or deposit into navigable waters of the United States and their tributaries of any refuse matter of any kind or description whatever, other than that flowing from streets and sewers and passing therefrom in a liquid state *The essential purpose of this section was to prevent the introduction into navigable waters of such material as would form a physical obstruction to navigation. These provisions have proved reasonably effective in preventing the discharge of such materials and have conserved the interests of navigation.* [Emphasis added.]

The amendment proposed by section 1 of this bill would prohibit the discharge of substances flowing from streets and sewers in a liquid state. In most cases, discharges of this type do not cause an obstruction to or interference with commerce or commercial navigation. Many important cities and communities are now adopting methods for treating sewage so as to remove suspended solids and other objectionable materials, and conditions are undergoing improvement. However, the discharge of domestic sewage into waterways from nearly all cities and inhabited communities has

been in practice since the first development of our country. Many of the cities and villages are in no financial condition, at the present time, to provide remedial works, and in many instances, such remedial works are not immediately necessary.

It would appear advisable that a further investigation be made to determine the exact effects of the proposed legislation, as its enforcement in the interests of navigation would be difficult to justify. * * *

1937

Letter from Chicago District Engineers to Carnegie-Illinois Steel Co.

April 6, 1937

A recent investigation made by this office shows that a considerable quantity of flue dust or other solids is being discharged into the lake in front of your plant at South Chicago. It will be appreciated if you will have one of your engineers, or other official, familiar with conditions at that locality, meet me at your South Works either on April 12 or 13 to go over the situation with me on the grounds. * * *

Letter from Chicago District Engineers to Carnegie-Illinois Steel Co.

After a detailed discussion of naturally caused shoaling and industrially caused shoaling, the district engineer concluded:

May 7, 1937

* * * * *

I, therefore, conclude that the Carnegie-Illinois Steel Company is responsible for all deposits above the depth of 20 feet over the area proposed to be

dredged and should assume the cost of removing the quantity of material lying above that plane, amounting to approximately 455,000 cubic yards. This figure does not include overdepth dredging as it will be assumed by this office.

If you concur in this finding, it will be appreciated if your company will write me a letter agreeing to remove the 455,000 cubic yards, or will contribute sufficient funds to pay for the removal of this quantity of material from this section when we contract for dredging in this area. * * *

1941

Letter from Chicago District Engineers to Republic Steel Corp.

April 14, 1941

A recent survey of the Calumet River shows that a shoal has developed on the east side of the river between 119th and 120th Streets, extended, Chicago, Illinois, just downstream (south) of the sewer outfall at your plant.

The shoal is apparently the result of solids and suspended matter discharged from the sewer. Such discharge of material into the river is in violation of Federal law and eventually will seriously obstruct navigation. The shoal now extends about 65 feet into the channel.

It is requested that you make such arrangements as are necessary to prevent further discharge of solid materials into navigable waters and that the material which has already encroached upon the channel be removed.

If you notify this office about when you expect to be able to remove the deposit we will assist by

indicating the channel lines and the limits of necessary dredging.

1942

Letter from Chicago District Engineers to Interlake Iron Corp.

March 10, 1942

Soundings recently taken in the Calumet River show that a shoal has developed on the south side of the river extending from the Rock Island slip to a point about 800 feet lakeward thereof.

This shoal is apparently the result of material discharged from your sewers. As the shoal seriously obstructs navigation, and as the discharge of such material into the river is in violation of the Federal law, it is requested that you make arrangements to remove it to a depth of 21 feet below Low Water Datum, Lake Michigan, as soon as possible. The shoal contains about 21,000 cubic yards of material and is shown on the accompanying map.

I shall award a contract for dredging the Calumet River this spring and, if you prefer, the shoal will be removed under this contract, provided assurance is given that you will reimburse the Government for the cost of its removal, estimated at $12,000.00.

1944

Letter from Chicago District Engineers to Interlake Iron Corp.

27 April 1944

Recent soundings in the Calumet River show that a shoal has developed on the south side of the river extending from the Rock Island slip to a

point about 1,000 feet lakeward thereof. (See accompanying map). You will observe that this shoal is in about the same location as the one this office requested you to dredge in letter of 10 March 1942.

This shoal is apparently the result of material discharged from your sewers. As it obstructs navigation, and as the discharge of such material into the river is in violation of the Federal law, it is requested that you arrange to dredge this material to a depth of 21 feet below Low Water Datum, Lake Michigan, as soon as possible.

A portion of Section 13 of the River & Harbor Act of 3 March 1899, is quoted below:

> "That it shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water."

* * * * *

Letter from Chicago District Engineers to Wisconsin Steel Co.

27 April 1944

Soundings recently completed in the Calumet River show that three shoals have developed in the river opposite your sewers. These shoals, which are shown on the accompanying map, are appar-

ently the result of material discharged from your sewers. As these shoals obstruct navigation, and as the discharge of such material into the river is in violation of the Federal law, it is requested that you arrange to remove these shoals to a depth of 21 feet below Low Water Datum, Lake Michigan, as soon as possible.

[The last paragraph of this letter was the same as the last paragraph of the immediately preceding letter.]

1945

Letter from Chicago District Engineers to Wisconsin Steel Co.

28 March 1945

Soundings recently completed in the Calumet River show that two shoals have developed in the river opposite your sewers. These shoals, which are shown on the accompanying map, are apparently the result of material discharged from your sewers. As these shoals obstruct navigation, and as the discharge of such material into the river is in violation of the Federal law, it is requested that you arrange to remove these shoals to a depth of 21 feet below Low Water Datum, Lake Michigan, as soon as possible.

[This letter concluded with reference to Sec. 13 of the Act of 1899.]

Letter from Chicago District Engineers to Interlake Iron Corp.

15 February 1945

Reference is made to our letter of 23 May 1944, in which you were requested to dredge a shoal in the Calumet River adjoining your property, and to

the request made in your communication of 20 June 1944, namely, that your company be allowed to defer this dredging until the spring of 1945. Our letter of 27 June 1944 granted your request, with the understanding that this shoal would be removed by the corporation early this year.

The accompanying map of recent soundings in the Calumet River shows that the shoal adjoining your property extends about 130 feet into the channel, and that depths over it vary from about 19.8 feet at its channel edge to 7.6 feet at the south channel line. Obviously, this obstruction, which contains about 21,000 cubic yards above elevation −23, prohibits the safe navigation of vessels drawing considerably less than the project depth of 21 feet, which the United States is authorized to maintain.

As the transportation of material vital to the war effort will be resumed by 15 March, or sooner, it is requested that this shoal be removed at the earliest practicable date and, if possible, prior to 15 March.

* * * * *

1946

Letter from Chicago District Engineers to Interlake Iron Corp.

22 April 1946

Soundings taken in a portion of the Calumet River on 19 April 1946 show that a shoal has formed on the south side of the river adjoining your property extending from the Rock Island slip to a point about 900 feet lakeward thereof. Portions of this shoal extend into the channel about 100 feet from the south channel line, and depths over it vary from 12.4 feet along the south side of the channel to 20.9 feet at its channelward edge.

(See accompanying map showing shoal outlined in red.)

As this shoal is evidently the result of material discharged into the river by your sewers, and as it prohibits the safe navigation of vessels drawing less than 21 feet, the depth now maintained by the United States in this part of the river, it is requested that it be removed to a depth of not less than 21 feet below Low Water Datum, Lake Michigan (578.5 feet above Mean Tide New York), at the earliest practicable date.

* * * * *

1947

Letter from Chicago District Engineers to Wisconsin Steel Co.

24 March 1947

Recent soundings in the Calumet River show that three shoals have formed in the river adjoining your property between stations 127 and 144. (See accompanying map showing shoals outlined in red.)

These shoals are evidently the result of material discharged into the river by your sewers, and obstruct the safe navigation of vessels in this reach of the river. As you realize, from former letters from this office, the discharge of such material into the river is in violation of Section 13 of the River and Harbor Act of 3 March 1899. Therefore, it is requested that the shoals be removed to a depth of not less than 21 feet below Low Water Datum, Lake Michigan (578.5 feet above Mean Tide New York), at the earliest practicable date.

Letter from Chicago District Engineers to Interlake Iron Corp.

24 March 1947

Recent soundings taken in the Calumet River show that two shoals have formed on the south side of the river adjoining your property extending between stations 116 and 131. (See accompanying map showing shoals outlined in red.)

Those shoals are evidently the result of material discharged into the river by your sewers, and obstruct the safe navigation of vessels in this reach of the river. As you realize, from former letters from this office, the discharge of such material into the river is in violation of Section 13 of the River and Harbor Act of 3 March 1899. Therefore, it is requested that the shoals be removed to a depth of not less than 21 feet below Low Water Datum, Lake Michigan (578.5 feet above Mean Tide New York), at the earliest practicable date.

1948

Letter from Chicago District Engineers to Interlake Iron Corp.

10 March 1948

Maintenance dredging to restore a depth of 21 feet in the Calumet River was started on 11 September 1947, under a contract awarded by this office, and the work was completed about 18 October 1947, with the exception of the "Rock Section".

On 24 March 1947, this office requested your company to dredge the shoal marked ABC on the accompanying map, as it had formed as a result of deposits from your industrial sewers. This shoal was dredged by you to a depth of 21 feet below

Low Water Datum, Lake Michigan, during May, 1947. However, you will observe that in some locations the after dredging soundings in the area, shown in blue, are five feet less than 21 feet, the depth that was to be provided. The before dredging soundings are shown in red.

As shoaling in this reach of the river has formed because of the discharge from your industrial sewers, it is regretted that it is again necessary to request that the shoal area shown in green on the map, be dredged by you to a depth of 21 feet below Low Water Datum, Lake Michigan. This dredging should be done as soon as possible, so that ample depths will be available in the entire river when the contract dredging, now in progress is completed.

* * * * *

1949

Letter from Chicago District Engineers to Interlake Iron Corp.

24 February 1949

Recent soundings in the Calumet River show that two shoals have formed in the river adjoining your property between stations 117 and 131 (See accompanying map indicating shoals to be removed).

These shoals are evidently the result of material discharged into the river by your sewers, and obstruct the safe navigation of vessels in this reach of the river. You have been advised by previous correspondence from this office that the discharge of such material into the river is in violation of Section 13 of the River and Harbor Act of 3 March 1899. Therefore, it is requested that the shoals

be removed to a depth of not less than 21 feet below Low Water Datum, Lake Michigan (578.5 feet above Mean Tide New York), at the earliest practicable date.

Letter from Chicago District Engineers to Wisconsin Steel Works

24 February 1949

Recent soundings in the Calumet River show that two shoals have formed in the river adjoining your property between stations 127 and 144. (See accompanying map indicating shoals to be removed).

These shoals are evidently the result of material discharged into the river by your sewers, and obstruct the safe navigation of vessels in this reach of the river. You have been advised by previous correspondence from this office that the discharge of such material into the river is in violation of Section 13 of the River and Harbor Act of 3 March 1899. Therefore, it is requested that the shoals be removed to a depth of not less than 21 feet below Low Water Datum, Lake Michigan (578.5 feet above Mean Tide New York), at the earliest practicable date.

1950

Letter from Chicago District Engineers to Wisconsin Steel Works

21 March 1950

Recent soundings in the Calumet River show that shoals have formed in the river adjoining your property between stations 132 and 147. (See accompanying map indicating shoals to be removed.)

These shoals are evidently the result of material discharged into the river by your sewers, and obstruct the safe navigation of vessels in this reach of the river. You have been advised by previous correspondence from this office that the discharge of such material into the river is in violation of Section 13 of the River and Harbor Act of 3 March 1899, therefore, it is requested that the shoals be removed to a depth of not less than 21 feet below Low Water Datum, Lake Michigan (578.5 feet above Mean Tide New York), at the earliest practicable date.

1954

Hearings, Subcommittee of the House Committee on Appropriations, 83d Cong., 2d Sess., Vol 8, pp. 695-696

The following passage is from the hearings on the appropriations for the civil functions of the Department of the Army for the fiscal year ending June 30, 1955:

Mr. DAVIS. Calumet River, Ill., no tentative allocation and an actual allocation of nearly $60,000.

Colonel POWERS. A portion of the funds required for Calumet River and Harbor are being used to carry on condition surveys and operation studies largely in connection with a determination of the liability of industry for having placed illegal deposits of flue dust in the channel. These deposits are in violation of section 13 of the 1899 River and Harbor Act. There is a small amount of work on the breakwater structure required. The main portion of the funds is for working out with the steel companies their responsibility in respect to removing from the channel the shoals which the effluents from their sewer discharges have caused.

Mr. DAVIS. What recourse does the Corps of

Engineers have in the case of illegal deposits such as that?

Colonel POWERS. Up to the present time, our efforts have been expended in the direction of pointing out to the industrial concerns where they, by their action in operating their sewage outflows, have caused shoaling in the channels and attempting to reason with them and explain the necessity for the removal of their own deposits which are made illegally. We cannot force them to pay their proportionate share, but upon negotiation in a number of places they have paid their proportionate cost of removal.

As a matter of fact, on the Calumet River it has been done before. In 1951 each of the steel companies involved paid its proportionate share of removal of the flue dust settlement in the river, but this time it does not appear they are all willing to continue on that basis. And if they are adamant in their position, we will have to take action through the Department of Justice to prevent them from continuing to put the material into the river without adequate arrangements to safeguard the interests of navigation.

Mr. DAVIS. Certainly they recognize that their harming of the maintenance projects of this kind is a very great deterrent to any future structures of that nature in that area, do they not?

Colonel POWERS. It has been pointed out to them. The Interlake Iron Corp. and International Harvester, the Wisconsin Steel Division, are willing to pay their proportionate share provided the third company, Republic Steel, does so. Republic Steel does not feel they should have any responsibility in the matter. That matter is still under negotiation with the companies.

Mr. DAVIS. Is this related to this Calumet Sag Waterway, where planning funds are in this budget?

Colonel POWERS. No, sir.

Mr. CEDERBERG. Well it is related in a way; is it not?

Mr. DAVIS. It is related to the Calumet Sag Harbor project.

Colonel POWERS. Yes, sir; it is in the same general area to be benefited by Calumet Sag project. We have not allocated any maintenance money for channel dredging there until this matter is settled.

Mr. CEDERBERG. Actually Calumet Sag will have an effect upon Calumet Harbor and all of the industries in that area; is not that correct?

Colonel POWERS. Yes, sir; that is correct.

Mr. DAVIS. You have a similar problem at Cleveland of this illegal deposits?

Colonel POWERS. Yes, sir; we have a similar problem at Cleveland and the difficulty there is with the same firm, Republic Steel. And in every other instance that has come to my attention, the offending companies have been agreeable to paying their proportionate share. That has happened in 4 or 5 places.

Mr. DAVIS. Republic Steel is certainly one of the major beneficiaries of the improvement of the Cuyahoga River; is it not?

Colonel POWERS. Yes, sir.

H. Rept. 1345, 83d Cong., 2d Sess., Cong., Doc. Ser. No. 11738, p. 10

This was the report on the Department of the Army's Civil Functions Appropriations Bill for 1955. The passage below appeared in the portion dealing with the

expenses for operation and maintenance of projects of the Corps of Engineers.

In Calumet River and Harbor, Illinois, and Cleveland Harbor, Ohio, a serious problem exists with reference to illegal deposits by private industries in the navigation channels. These deposits are in violation of Section 13 of the 1899 River and Harbor Act. The deposits have created shoaling conditions to the detriment of the Federally maintained channels. As of the time of the hearings on this bill the Corps of Engineers had been unsuccessful in their efforts to have all of the companies responsible pay their proportionate share toward removal of the deposits. The very companies which have refused to cooperate are beneficiaries of both construction and maintenance funds provided in this bill. Such an attitude on the part of such local interests is inconceivable. It will be expected that the Corps of Engineers will make vigorous efforts to secure proper compliance with the law governing illegal deposits, including action by the Department of Justice if necessary. The Chief of Engineers is directed to file with the committee, not later than December 15, 1954, the actions taken on this matter and the results obtained.

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In the Supreme Court of the United States

OCTOBER TERM, 1959.

No. 56.

UNITED STATES OF AMERICA,
Petitioner,

v.

REPUBLIC STEEL CORPORATION,
INTERNATIONAL HARVESTER COMPANY,
and
INTERLAKE IRON CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT.

BRIEF OF RESPONDENT INTERLAKE IRON CORPORATION.

RAYMOND T. JACKSON,
WARREN DAANE,
1956 Union Commerce Bldg.,
Cleveland 14, Ohio,

HENRY E. SEYFARTH,
231 S. LaSalle St.,
Chicago 4, Ill.,
Attorneys for Respondent Interlake Iron Corporation.

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In the Supreme Court of the United States

OCTOBER TERM, 1959.

No. 56.

UNITED STATES OF AMERICA,
Petitioner,

v.

REPUBLIC STEEL CORPORATION,
INTERNATIONAL HARVESTER COMPANY,
and
INTERLAKE IRON CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT.

BRIEF OF RESPONDENT INTERLAKE IRON CORPORATION.

OPINIONS BELOW.

The memorandum of the District Court (R. 91) is reported at 155 F. Supp. 442. The opinion of the Court of Appeals (R. 2559)* is reported at 264 F. 2d 289.

* The following abbreviations are used in this brief: Record—R.; Petitioner's Brief—Pet. Br.; Interlake Exhibit—Interlake Ex.; the Rivers & Harbors Act of March 3, 1899—the 1899 Act; House Document—H. D. All emphasis is supplied.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petitioner's brief.

STATUTES INVOLVED.

Sections 10, 12, 13, 16 and the last paragraph of Section 20 (the repeal and saving clause) of the Rivers and Harbors Act of March 3, 1899, 30 Stat. 1121, 1151-2, 1153, 1155, 33 U. S. C. 403, 406, 407, 411 are printed at pages 47-9 and 53 of Appendix A to Petitioner's brief; and relevant excerpts are quoted in the Argument *infra*. In our opinion, neither Section 10 of the Rivers and Harbors Act of September 19, 1890, 26 Stat. 426, 454, nor Section 17 of the Rivers and Harbors Act of March 3, 1899, 30 Stat. 1121, 1153, 33 U. S. C. 413, is involved.

QUESTIONS PRESENTED.

1. Whether the validity of the challenged acts of Respondent Interlake Iron Corporation (hereinafter called "Interlake") is exclusively governed by Section 13 of the Rivers & Harbors Act of 1899 (33 U. S. C. 407) by which the Congress comprehensively and specifically regulated the discharge of "any refuse matter of any kind or description whatever * * * into any navigable water of the United States."

2. Whether, by discharging into the Calumet River sewer effluents (of which from 99.98% to 99.99% is water) Interlake violated Section 13 of the Rivers and Harbors Act of 1899 (33 U. S. C. 407) in which Congress specifically excepted from its prohibitions the discharge of "any refuse matter of any kind or description whatever * * * flowing from streets and sewers and passing therefrom in a liquid state."

3. Whether, assuming *arguendo* Section 10 of the Rivers and Harbors Act of 1899 (33 U. S. C. 403) were applicable, the foregoing acts of Interlake would violate that statute.

4. Whether the statutory remedies specifically and expressly created and provided by the Congress in Section 12 of the Rivers and Harbors Act of 1899 (33 U. S. C. 406) for a violation of Section 10 of the Rivers and Harbors Act of 1899 (33 U. S. C. 403) and in Section 16 of the Rivers and Harbors Act of 1899 (33 U. S. C. 411) for a violation of Section 13 of that Act (33 U. S. C. 407) are exclusive and would bar the relief sought by Petitioner had a violation of either Section been established.*

In the Court of Appeals, Respondents severally attacked the validity of the trial court's decree upon additional grounds (including the insufficiency of the evidence to support certain findings) which the Court of Appeals, having dismissed the cases on other grounds, found it unnecessary to consider or decide. (R. 2580.) We agree with Petitioner (Pet. Br. 3) that the additional questions, upon which the Court of Appeals did not pass, are not now presented for review by this Court. Should this Court reverse the decision of the Court of Appeals, the case would, as we understand the practice, be remanded to the Court of Appeals for further proceedings in accordance with the opinion of this Court and for decision of the additional questions presented, but not decided, in the court below.

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* The language, in which Petitioner has stated its version of the "Questions Presented," is so general and abstract as not to constitute any definitive or meaningful statement of the questions now before this Court in these cases. (Pet. Br. 2.)

STATEMENT.

In this action separate claims were permissively joined against the three Respondents (R. 7-8, 71-4; F. R. C. P. 20(a).* The original and amended complaints alleged that each Respondent had violated and was violating sections 10 and 13 of the Rivers and Harbors Act of 1899 (33 U. S. C. 403 and 407) by discharging and depositing "industrial solids and flue dust" in a section of the channel of the Calumet River. The Calumet River lies wholly within the State of Illinois. In 1922 the natural flow of the Calumet River into Lake Michigan was reversed by the Chicago Sanitary District.

Petitioner sought a decree (1) restraining each Respondent from depositing or discharging "industrial solids or flue dust" into the Channel of the Calumet River without a permit and (2) commanding Respondents, and each of them, to restore the authorized project depths and widths throughout a section of the River *extending 1800 feet upstream and 13,200 feet downstream* from the mouth of any sewer of Interlake. (Comp., R. 7-9; Amend. Comp., R. 71-4.) In addition to the steel plants of the other Respondents, two plants for the production of coke, pig iron, *steel and various steel products*, each of which is very much larger than the plant of any Respondent, are located *up-*

* The permissive joinder of *separate* claims against the three Respondents obviously did not authorize the District Court (1) to make general findings against all Respondents whenever there was any evidence to support a finding against any one of them or (2) to refuse to make any findings on facts relevant to the separate claim against Interlake which were supported by uncontradicted evidence. Nevertheless, the trial court, adopting verbatim or substantially verbatim, proposed findings of Petitioner, made numerous undiscriminating general findings against all Respondents, which were wholly unsupported as to *the claim against Interlake*, and refused to make any findings on undisputed facts *relevant to the separate claim against Interlake*. (Cf. R. 190-251 with R. 98-110.)

stream from the plant of each Respondent. In addition to the plants of the three Respondents, numerous other industrial plants are located on, and 37 sewers in addition to the Respondents' sewers discharge into, the Calumet River both above and below the Interlake Plant. (R. 365-72.)

The District Court entered a decree granting the relief prayed by Petitioner. (R. 111.) The Court of Appeals reversed with directions to dismiss the amended complaint upon the independent grounds (1) that the acts of Interlake and the other Respondents did not violate either Section 10 or Section 13 of the Rivers and Harbors Act of 1899 (33 U. S. C. 403 and 407) and (2) that, had Petitioner established a violation of either Section, the respective remedies created and provided by the Congress for a violation of each of those sections are exclusive and do not authorize the relief sought by Petitioner. (R. 2559-80; especially 2574, 2575-6.) Consequently that Court found it unnecessary to state or decide the numerous other grounds upon which Respondents attacked the validity of the decree of the trial court. (R. 2580.)

Petitioner's statement (Pet. Br. 2-8) ignores the separate character of the claim against each Respondent and the differences among the character and operations of their respective plants and understates the extreme fineness of any materials carried in suspension by sewer effluents, and the numerous processes and equipment by which each Respondent reclaims such materials to the greatest practical extent. (R. 2571, 2572.) Since the claim against Interlake is wholly separate and independent, Interlake's statement is limited to matters relevant to that claim. Contrary to Petitioner's statement (Pet. Br. 8), none of the specific facts hereinafter set forth with respect to Interlake's operations is contrary to any finding of the district court.

Interlake produces merchant pig iron at a plant located on the Calumet River more than 2 miles downstream from Lake Michigan. (R. 51-2; 1831-4.) It does not own or operate any mills or foundries for converting pig iron into other iron products, any steel making furnaces, steel mills, or fabricating mills. (R. 1836.) Interlake withdraws water (carrying some solids in suspension) from the Calumet River for industrial use in the operation of coke ovens and blast furnaces for the production of pig iron. (R. 52-4.) Unavoidably the operation of coke ovens and blast furnaces respectively creates "coke breeze" and "flue dust." These are the principal and only significant "industrial solids" involved in the claim against Interlake.

"Coke breeze" and "flue dust" principally consist of very fine particles. Petitioner's witnesses conceded that most of these particles were smaller than 44 microns and that many are so small that they could not be seen even with the aid of an ordinary microscope. (R. 931, 1300.) Much of the small amount of material carried in suspension or solution by the outflow of Interlake's sewers is so fine that it will never settle out. (R. 1047-8.) A micron is .001 of a millimeter or .00003937 of an inch. The facts with respect to the fineness of this material are set forth in the opinion below. (R. 2571, 2572.)

Contrary to Petitioner's undiscriminating statement (Pet. Br. 4) any "flue dust" produced by the operations of this Respondent could not contain "mill scale" or any slag and other refuse matter produced by facilities for making or fabricating steel. "Coke breeze" does not contain any of the other kinds of materials enumerated in the foregoing statement of Petitioner.

However, each of these products is valuable, and self-interest alone compels Interlake to avoid any loss of either product to the greatest practical extent. In the produc-

tion process some of each material comes into contact with, and is taken up by, some of the water drawn from the River. Numerous processes and types of equipment* are used by Interlake to recover these materials from the water before it flows back through five sewers into the River or into the privately-owned Semet-Solvay slip. Small amounts of very fine particles of these valuable materials, which are carried in suspension or solution, cannot be recovered from the water. However, from 99.98% to 99.99% of the effluents of each of Interlake's sewer is *water*. (Interlake Ex. 10, R. 1857, 2456.) With passage of time and changing conditions some of the fine material carried in the returning water settles out of suspension or solution and deposits at fortuitous times and places outside or inside of the navigation channel and in a private slip which connects with the River.

Interlake, which has consistently and voluntarily dredged *in front of its plant and in its private slip*, dredged 254,535 cubic yards of material from those locations between 1946 and 1955. (R. 2466.) In 1951 the three Respondents voluntarily cooperated in dredging the section of the River in *front* of their respective plants (but not for 700 feet *upstream* and approximately 2 miles *downstream* from the plant of any Respondent as ordered by the District Court) upon an express understanding with the Corps of Engineers that their voluntary and gratuitous action should not constitute, or ever be claimed to constitute, the assumption or recognition of any obligation to do such dredging by any of the Respondents. Petitioner itself

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* Such facilities include a large dust catcher which removes from 40% to 60% of the flue dust in a dry state (1839-40, 1914-15) and a Dorr Thickener (installed in October 1942) which removes 98% of any flue dust remaining in the water with which the dry gas from the dust catcher has been washed (R. 1843; Interlake Ex. 7, R. 1847, 2451-2).

now disclaims any contention that such voluntary and gratuitous cooperation by Respondents give rise to any estoppel or constitutes an alleged administrative construction. (Pet. Br. 64.)

Petitioner's Statement (Pet. Br. 5-6, 7-8) refers to a 1954 Report of a House Committee and to certain findings of the trial court which Respondents severally challenged in the Court of Appeals as clearly erroneous, but which that court, having dismissed the case upon other grounds, found it unnecessary to consider. In our view this material is not here relevant or properly a part of the Statement; but in so far as Petitioner subsequently relies upon any of such material, it is dealt with at appropriate places in Interlake's Argument.

SUMMARY OF ARGUMENT.

I.

The undisputed and controlling facts with respect to the correctness of the decision below on the separate claim against Respondent, Interlake Iron Corporation, are: The liquid flowing into the Calumet River or a private slip from Interlake's five sewers is not less than 99.98% water. However, this liquid carries in suspension or impermanent solution a small amount of very fine particles of valuable materials which Interlake is unable to reclaim by the numerous processes and extensive equipment used for that purpose. Some of such fine materials so carried in suspension or solution settles at fortuitous times or places principally in a private slip and in the River outside the navigation channel but partially in the navigation channel. Interlake voluntarily and regularly dredges in front of its plant and in its private slip which necessarily contributes to the maintenance of the navigation channel.

A. The validity of Interlake's acts is exclusively governed by Section 13 of the Rivers and Harbors Act of 1899, 33 U. S. C. 407; and Section 10 of the 1899 Act, 33 U. S. C. 403, is wholly inapplicable.

1. Sections 10 and 13 were simultaneously enacted as parts of the Rivers and Harbors Act of March 3, 1899 (30 Stat. 1121, 1151, 1152) (hereinafter called the 1899 Act). An established principle is that, where the same statute contains a provision dealing with a particular subject, and also another provision couched in general language which in its most comprehensive sense would or might include the same subject, the special provision is the controlling and exclusive regulation of the particular subject and the general provision or section is inapplicable.

Sections 9-20 inclusive of the 1899 Act were comprehensive and all-inclusive revisions of existing general laws for the protection of navigable waters in which Congress undertook to balance the respective national interests in protecting navigation and simultaneously preserving non-navigation uses of navigable waters upon which depended the functioning and prosperity of the national economy. To accomplish its objective Congress dealt separately, completely and specifically with different segments of the over-all problem in separate sections of the 1899 Act. Consequently the foregoing principle applies with extraordinary force here.

2. In Section 13 of the 1899 Act, Congress dealt specifically, comprehensively and completely with the discharge or deposit from any source of "refuse matter of any kind or description whatever * * * into any navigable water of the United States." Section 10 of the 1899 Act does not deal specifically, and, in our opinion, does not deal at all, with the discharge or deposit of refuse matter. Even if, contrary to our belief, any general language con-

tained in Section 10 could otherwise be construed so broadly as to bring within its generality a discharge or deposit of "refuse matter" into or in navigable waters, the specific provisions of Section 13 would, nevertheless, be the controlling and exclusive regulation of that subject matter under established principles of statutory construction.

3. If Petitioner's "administrative and congressional material" established any administrative construction, it would be that the administrative officers and the House committee uniformly agreed that Section 13 is the only section of the 1899 Act which is applicable to the acts of Interlake or of the other Respondents.

II.

Interlake's acts do not violate Section 13 of the 1899 Act. In enacting Section 13, Congress carefully and specifically excluded from its prohibitions "refuse matter [from any source] of any kind or description whatever * * * flowing from streets and sewers and passing therefrom in a liquid state." In Section 13, Congress was dealing with that segment of the over-all subject matter which, above all others, involved a careful appraisal and balancing of the uses of navigable waters for navigation and their use for non-navigation purposes upon which the functioning and prosperity of the national economy depended.

A. The language of a statute must be construed in the light of the facts, circumstances and conditions which existed at the time of its enactment; for the meaning of its words must be closely related to the circumstances of their use.

1. In 1899, when Section 13 was enacted, the population of communities which provided even *partial* treat-

ment for their domestic, trade and industrial wastes, was less than 3.3% of the total urban population. Street run-offs and sewer outflows were discharged into the nearest body of water which, in the case of substantial communities, was generally, if not invariably, a navigable water. Had Congress prohibited the discharge of street run-offs and sewer outflows which carried any material in suspension or in impermanent solution, the result would have been to outlaw the universally used and only available method for disposing of street run-offs and sewer outflows and would have brought urban life and industrial activity substantially to a standstill throughout the nation. Only the most clear and compelling statutory language could justify imputing such an egregious intent to the Congress.

B. A statute will not be construed so as to deprive the statutory language of any meaning or practical effect. Nor, will Courts attribute to the Congress an intent to enact futile and vain legislation which, as a matter of general knowledge, could never have any application to the subject matter of the legislation.

1. Unless street run-offs or the outflows of sewers carry "refuse matter" of some kind or description, no exception was needed to take them out of the prohibition of Section 13. By excepting "refuse matter of any kind or description whatever * * * flowing from streets and sewers and passing therefrom in a liquid state," the Congress plainly intended to accomplish a substantial, practical and important purpose. Indisputably, street run-offs and sewer outflows then carried and now carry "refuse matter" in suspension. Indeed, water, which contains no material in suspension, is unknown even in a state of nature. To hold that the effluents of Interlake's sewers do not come within this exception would completely nullify the exception and

defeat the congressional intent; for if sewer effluents, which carry a small amount of fine nonputrescible materials in suspension but are not less than 99.98% water, do not come within the exception, then no street run-off or sewer outflow existed in 1899 or now exists which could come within the exception.

C. The words of a statute are given their customary meaning in common everyday usage at the time when that statute was enacted. Manifestly, Congress did not use the phrase "in a liquid state" with some undisclosed technical meaning but in accordance with normal every day usage. In the common usage of 1899 or of today, no one would describe a sewer outflow like those from Interlake's sewers other than as in a liquid state. Moreover, Petitioner's contention that the phrase "in a liquid state" limits the exception to street run-offs or sewer outflows, which do not contain any material other than in permanent solution, would indisputably have deprived the exception of any application in 1899 and would deprive it of any application today. Furthermore, the gross improbability that Congress would incorporate such a refined, nebulous and unexpressed standard of legality in a criminal statute, is alone sufficient to condemn this interpretation of Petitioner.

1. Petitioner's argument, first advanced in this Court, that the exception "*seems*" to mean only refuse matter which "is normally defined as sewage," is plainly untenable. Section 13 includes "refuse matter of any kind or description whatever," from all sources and specifically from "a manufacturing establishment or mill of any kind," which plainly includes industrial wastes. The language of the exception is as sweeping and all-inclusive as that of the prohibition, and its applicability in no way depends

upon the kind or source of "refuse matter" passing from sewers in a liquid state. Moreover, municipal sewers commonly carried and still commonly carry both domestic and trade refuse matter.

D. Significantly, although Section 13 and predecessor statutes in substantially identical language, have been in force for over 70 years, no Court, except the trial court in the instant case, has ever held that Section 13 prohibits the discharge of street run-offs or sewer outflows which carry any material in suspension or in impermanent solution.

E. The exception incorporated in Section 13 is a congressional determination that the discharge or deposit of "refuse matter of any kind or description whatever * * * flowing from streets and sewers and passing therefrom in a liquid state" into any navigable water, shall not constitute an interference with or an obstruction to navigation or navigable capacity *as a matter of law*. Such a determination made by the Congress in the exercise of its exclusive constitutional authority to regulate commerce is conclusive.

1. Annual or periodic dredging is a necessary part of the cost of maintaining navigation improvements. Throughout our history these costs have been financed by the Government. In so far, if at all, as the exception incorporated in Section 13 might somewhat increase annual or periodic maintenance dredging, Congress plainly concluded either that it would be equitable for the Government to bear the increased cost, if any, or that the alternative would involve much greater loss to the national economy. In any event, that choice lay within the exclusive discretion of the Congress.

III.

Assuming Section 10 of the 1899 Act (33 U. S. C. 403) were applicable, Interlake's acts would not violate that Section.

A. The third clause of Section 10 provides that "it shall not be lawful to excavate or fill, or in any manner to alter or to modify the * * * condition or capacity of * * * the channel of any navigable water of the United States" unless "the work" has been recommended and authorized by the specified officers. Excavations are normally made to improve or provide access to a navigable channel or to divert waters of a navigable channel for non-navigation uses. Fills are normally made either in wharfing out to a navigable channel or to convert submerged lands lying landward of the navigation channel to some profitable use by the riparian owner. The term "to excavate or fill" is defined by the statute as "the work" which must be recommended and authorized by the specified officers. Manifestly, in 1899 or since, the words "to excavate or fill" or "the work" did not include the settlement of some of the very fine material carried in suspension or in permanent solution by the Interlake sewer effluents, of which not less than 98.98% was and is water. Furthermore, even if Section 13 of the 1899 Act (33 U. S. C. 407) did not exclusively govern the validity of Interlake's acts, Sections 10 and 13 of the 1890 Act are at least in *pari materia*. It would be inadmissible to attribute a strained and abnormal meaning of the words "to excavate or fill" and to the term "the work" in order to bring within the third clause of Section 10 acts which are specifically regulated in Section 13.

B. The first clause of Section 10 prohibits "the creation of any obstruction not affirmatively authorized by

Congress, to the navigable capacity of any of the waters of the United States." In normal usage and understanding, the word "creation" means that something has been, or is being, brought into being for permanent use by its creator which, as applied in this clause, constitutes an obstruction. Nothing in the legislative history of Section 10, or in the conditions under which it was enacted, justifies an assumption that Congress used the word "creation" in any artificial or abnormal sense. Furthermore, since Sections 10 and 13 of the 1899 Act are at least in *pari materia*, it would be inadmissible to attribute a strained, abnormal or unusual meaning to the word "creation" in order to bring within the first clause of Section 10 acts which are specifically, directly and expressly regulated in Section 13.

1. Apart from the decision of the trial court in the instant case, all prior decisions have held that the language of the first clause of Section 10 of the 1899 Act, and like language in the first clause of Section 10 of the 1890 Act, applies only to obstructions of a permanent character which have been, or are being, purposefully created by the usual modes of construction to serve some purpose or use of their creator.

2. Petitioner misconceives *Sanitary District v. United States*, 266 U. S. 405 and *Wisconsin v. Illinois*, 278 U. S. 367. Those cases involves excavations of the *entire channels* of the Chicago and Calumet Rivers and the erection of various structures therein for the purpose of diverting the natural flows of those rivers plus additional water from Lake Michigan into the Mississippi water shed for a non-navigation use. These acts were, and could be, performed only under permits issued by the Secretary of War in compliance with conditions inserted therein. Such acts were expressly covered by Section 10. Significantly, in view of

Petitioner's present argument that every provision of the 1899 Act is subordinate to the first clause of Section 13, in *Wisconsin v. Illinois*, 278 U. S. 367, 411, 413-4, this Court held that the Secretary of War had authority to issue such permits notwithstanding the fact that the Sanitary District's acts authorized by them created an obstruction to navigable capacity.

C. Petitioner did not claim below, and does not claim here, that clause 2 of Section 10 is applicable to the acts of Interlake or of the other Respondents.

IV.

Had Petitioner established a violation of either Section 10 or Section 13 of the 1899 Act, the statutory remedies provided by Congress for their violation are exclusive and do not authorize the relief sought by Petitioner in the courts below or in this Court.

A. The Calumet River lies wholly within the State of Illinois. There is no federal common law applicable to alleged obstructions or nuisances in rivers which, although navigable interstate, are located wholly within one State; and no federal cause of action to abate such an alleged obstruction can exist separate and apart from a violation of a directly applicable federal statute. Federal constitutional authority to protect, and to regulate the use of, federal navigable waters is vested exclusively in the Congress; and neither the Department of Justice nor the Army Engineers can usurp that authority. Neither express statutory authority (e.g., Section 17 of the 1899 Act) nor general authority of the Attorney General to prosecute litigation on behalf of the United States, empowers the Attorney General to assert remedies which Congress did not see fit to create.

B. In enacting the 1899 Act, Congress expressly repealed all substantive and remedial provisions of all prior general laws which were inconsistent with Sections 9 through 20 of the Act of 1899 and made a careful, discriminating and express selection of the sanctions which it deemed appropriate for enforcement of each Section of the 1899 Act. This is a situation in which Congress has enacted an all-inclusive statutory scheme to protect, and to regulate the use of, navigable waters and has prescribed the sanctions and remedies which it deemed appropriate.

1. Section 12 of the 1899 Act (33 U. S. C. 406) Congress provided the exclusive sanctions for a violation of Section 10 (33 U. S. C. 403). In Section 12, Congress provided that a violation of Section 10 shall be punishable by fine and/or imprisonment and authorized an appropriate district court to compel, by mandatory injunction, "removal of any structures or parts of structures erected in violation of" Section 10. Manifestly, any deposits in the Calumet River, which allegedly were caused in part by the incidental settlement of some of the fine material carried by the water flowing from Interlake's sewers, are not "structures or parts of structures" (*United States v. Wilson* (2nd Cir.); 235 F. 2d 251, 252-3; R. 2574-6) and manifestly, neither injunctive relief or an action for damages is available to Petitioner.

2. Section 16 of the 1899 Act (33 U. S. C. 411), which makes a violation of Section 13, 33 U. S. C. 407, punishable by fine and/or imprisonment, contains the only sanction or remedy which Congress deemed appropriate for a violation of Section 13. Manifestly, had Petitioner established a violation of Section 13, it could not maintain an action for injunctive relief or for damages against Interlake.

C. In enacting the 1899 Act, Congress was exercising its exclusive constitutional authority to protect, and to regulate the uses of, federal navigable waters. The reasons, which impelled Congress to create the respective sanctions that it deemed appropriate for a violation of different sections of the 1899 Act, are not here material. The choice of sanctions was within the uncontrolled discretion of the Congress. However, the exclusion of any equitable remedy for a violation of Section 13 is consistent with the facts that annual or periodic dredging is a necessary part of the cost of maintaining navigation channels which the Government had borne throughout our history, and that the Congress was here dealing with the difficult problem of protecting navigation without inflicting incalculable damage on the national economy by destroying or unduly burdening non-navigation uses of navigable waters upon which its functioning and prosperity depended.

V.

Petitioner has wholly failed to establish any alleged administrative construction or its alleged ratification by Congress which is relevant to any of the issues before the Court. Were Petitioner's "administrative and congressional materials" relevant, the most that could be claimed for them would be that Section 13 is the only section of the 1899 Act which administrative officials or a committee of the Congress ever claimed to be applicable to Interlake's acts.

ARGUMENT.

Petitioner, in the opening paragraph of its argument, states the factual hypotheses upon which its arguments are based (Pet. Br. 14-5) but, in so doing, misconceives and misstates the facts upon which the decision below is based and its correctness depends. The pertinent facts, based upon findings of the trial court, are set forth in the opinion of the Court of Appeals. (R. 2560-2.)

Calumet Harbor, which serves a vast lake commerce to and from ports located on Lake Michigan in an arc extending from Chicago to Gary, Indiana, is not involved in this case. It is reasonable to assume that the opening of the St. Lawrence Seaway will increase the commerce served by Calumet Harbor and also commerce using the Calumet River. However, that circumstance will greatly increase the extent to which uses of the Calumet River by others for navigation exceed such uses by Respondents and emphasize the inequity of Petitioner's attempt to impose upon Interlake and other Respondents the burden of maintaining a navigation channel which will be primarily used by, and will primarily benefit, others or the public generally.

The authorized federal navigation improvement for the Calumet River (49 Stat. 1028, 1036) is that recommended in House Document 494, 72nd Congress, 2nd Session, in which the estimated costs of the Chief of Engineers (based upon 1932 prices) include an annual maintenance charge of $125,000 (H. D. 494, 3-4, par. 7; 28-9, par. 12). The District Engineer estimated annual maintenance costs at $135,000 (H. D. 494, 24-5, par. 9.)

When the United States constructs and operates a navigation project or improvement, it assumes the cost of maintenance as well as the cost of construction. It could no more impose upon private individuals the cost of main-

tenance of such a public project than it could impose upon them the cost of its construction. When a navigation project is constructed and operated under congressional authority, regular or periodic appropriations are made for its maintenance unless Congress elects to abandon it; and this has been the established practice throughout the history of federal river and harbor improvements. Thus, prior to June 30, 1932, the Government had expended $1,734,000 for the maintenance of the existing and prior federal navigation improvements on the Calumet River, the aggregate cost of which had been only $2,803,000 (Rep. Ex. 12, H. D. 494, 4-5. R. 1378, 2241, 2247). Where navigation projects, such as the one here involved, principally consist of the deepening and widening of a natural channel, annual or periodic dredging is not only a normal and inevitable element, but frequently the principal element, of the cost of their maintenance. However, that circumstance can furnish no justification for seeking to impose dredging cost upon private individuals.

In connection with Petitioner's claim that Respondents have reduced channel depths, the facts are in dispute; and it should also be noted that Interlake has consistently dredged in front of its plant and in its private slip which also, as a practical matter, necessarily contributes to maintenance of project depths in the navigation channel.

As to Petitioner's assertion (Pet. Br. 15) that the opinion below does not dispute the Respondents' alleged responsibility for creating any alleged obstructions (shoals), the court below expressly stated that the grounds of its decision made unnecessary any consideration of many other questions raised by each Respondent (R. 2580) among which were whether findings as to such alleged responsibility of Respondents were "clearly erroneous."

Petitioner's brief deals collectively with two or more sections of the 1899 Act (which are, or are claimed to be, involved) in a series of arguments based upon shifting hypotheses which, in our view, confuse the real issues. In the interest of clarity we shall deal separately with each section of the 1899 Act which is, or is claimed to be, involved or applicable.

I. VALIDITY OF THE ACTS OF RESPONDENT INTERLAKE IS GOVERNED EXCLUSIVELY BY SECTION 13 OF THE 1899 ACT, 33 U. S. C. 407.

1. Petitioner asserts that Interlake's acts violate both Section 10 and Section 13 of the 1899 Act. The initial question presented by this claim is whether the validity of Interlake's acts is exclusively governed by Section 13. Section 10 and the relevant part of Section 13 are set out below.

> "Sec. 10. That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other *structures* in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by

the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.

"Sec. 13. That it shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; * * *"

2. Sections 10 and 13 were simultaneously enacted as parts of the 1899 Act. The 1899 Act had its genesis in section 2 of the Rivers and Harbors Act of June 3, 1896, which provided:

"Sec. 2. That the Secretary of War is directed to cause to be prepared a compilation of *all general laws* that have been enacted *from time to time* by Congress for the maintenance, protection, and preservation of the navigable waters of the United States which are now in force, and to submit the same to Congress * * * with such recommendation as to *revision, emendation, or enlargement* of the said laws as, in his judgment, will be *advantageous to the public interest.*" (29 Stat. 202, 234.)

On February 13, 1897 the Secretary transmitted to the Congress his report in which he stated:

"In pursuance of the foregoing provision of the act, I have the honor to submit herewith (1) a compilation of the general laws relating to the maintenance, preservation, and protection of navigable waters of the United States now in force, and (2) a

> draft of an act embodying such *revision and enlargement* of the aforesaid laws as the experience of this office has shown to be *advantageous to the public interest.*" (H. D. 293, 54th Cong., 2d Sess., p. 2.)

The Secretary's draft of a proposed Act was entitled "Act *Revising and Enlarging* Laws for Protection of Navigable Waters." (Id. 8.)* The Secretary's Report was before the Congress for more than two years prior to the enactment of his proposed Act in the Rivers and Harbors Act of March 3, 1899.

Sections 9-20, inclusive, of the 1899 Act were a comprehensive and all-inclusive revision of existing general laws for the protection of navigable waters (R. 2563) in which Congress undertook to balance the respective national interests in protecting navigable waters and in preserving important (often indispensable) non-navigation uses of such waters. *Infra*, 25-6. Congress undertook to accomplish this objective by dealing separately, completely, specifically and differently with different segments of the

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* Contrary to Petitioner's assertion (Pet. Br. 21, 33) the Congress did not direct the "Chief of Engineers" [sic] to prepare, nor was the 1899 Act, a mere "codification" or "compilation" of then existing general laws for the protection of federal navigable waters. Instead, Congress directed the Secretary of War to submit his recommendations for such revision or enlargement of such existing laws as he deemed "most advantageous to the public interest." The letter of the Chief of Engineers, approved and transmitted by the Secretary of War, stated: "It [the recommended Act] is believed to be clear and free from ambiguity, and better adapted to conserve the important interests of commerce and navigation than the laws in their present form." (Id. 2.) That the 1899 Act was a comprehensive revision of such existing general laws is conclusively established by its genesis, by the detailed changes made in regulatory and enforcement provisions and by the express repeal of all general laws or parts thereof inconsistent with the respective sections of the 1899 Act. E. g. see Pet. Br. App. A, 53, App. B, 58-63 which, however, omits comparison of Section 9 of the 1899 Act with Section 3 of the Act of July 13, 1892, 27 Stat. 88, 110.

over-all subject matter in separate sections of the 1899 Act both with respect to substantive regulation and to remedy for violation. In this situation an extension of any substantive or remedial provision of one section to the subject matter of another section is clearly precluded. *Iselin v. United States*, 270 U. S. 245, 250-1 (1926).

3. Where the same statute contains a section dealing specifically with particular subject matter and another section containing general language which in its most comprehensive sense would or might include the same subject matter, the special section is the controlling and exclusive regulation of the particular subject matter and the general language of the other section is inapplicable. *United States v. Chase*, 135 U. S. 255, 260 (1890); *Ginsberg & Sons v. Popkin*, 285 U. S. 204, 208 (1932); *Fourco Glass Co. v. Transmirra Corp.*, 353 U. S. 222, 228-9 (1957). In the case last cited this Court said:

> "We think it is clear that § 1391 (c) is a general corporation venue statute, whereas § 1400 (b) is a special venue statute applicable, specifically, to *all* defendants in a particular type of actions, *i.e.*, patent infringement actions. In these circumstances the law is settled that 'However inclusive may be the general language of a statute, it "will not be held to apply to a matter specifically dealt with in another part of the same enactment. * * * Specific terms prevail over the general in the same or another statute which otherwise might be controlling." *Ginsberg & Sons v. Popkin*, 285 U. S. 204, 208.' *MacEvoy Co. v. United States*, 322 U. S. 102, 107."

The claim against Interlake involves solely the discharge of sewer effluents, whose constitutents are not less than 99.98% *water* but contain small amounts of fine material in suspension or solution, *some* of which subsequently

settles or deposits at fortuitous times and places within or without the navigation channel of the Calumet River or in a privately-owned connecting slip.

Section 13 (33 U. S. C. 407) deals specifically and comprehensively with the discharge or deposit of "refuse matter of *any kind or description whatever* * * * into any navigable water of the United States." Section 10 (33 U. S. C. 403) does not deal specifically, and in our opinion does not deal at all, with such discharges or deposits of refuse matter. Consequently, even if any of the general language of Section 10 could otherwise be construed so broadly as to bring within its generality the subject matter of the claim against Interlake, the specific regulation of Section 13 would nevertheless be the controlling and exclusive regulation of the subject matter involved.

4. In enacting Section 13, the Congress was dealing with the difficult and extremely important problem of exercising its exclusive constitutional authority reasonably or adequately to provide for the needs of navigation without destroying or making valueless state, municipal and private rights to make customary non-navigation uses of the same waters which were and still are essential to the functioning and prosperity of the national economy. To achieve this objective necessarily required the Congress to segregate, and separately and specifically regulate, this segment of the larger subject matter with which it was dealing in the 1899 Act. The achievement of this objective could not be left to, or dealt with by, general and sweeping language which might be construed as Petitioner now seeks to construe the language in the first clause of Section 10. Consequently, the Congress dealt separately, specifically and completely with this segment of the over-all problem of promoting the national welfare by legislation to

protect federal navigable waters in a special and specific section.

Petitioner's contention that the validity of Interlake's Act is not exclusively governed by Section 13 comes down to a contention that Congress intended to destroy or make illusory historic and long-established rights of States, municipalities and citizens, to make non-navigation uses of navigable waters, regardless of the effect upon community, business and industrial life and upon the national economy. It attributes to Congress an intent to sacrifice such invaluable non-navigable uses in order to prevent any conceivable inconvenience to navigation, however small or transient, and any conceivable increase in the normal cost of maintaining navigable channels which increase, if any, would be insignificant in comparison with the damages that such a congressional policy would have inflicted on the national economy. Such an argument is refuted by the congressional language, by its incalculably disastrous effects upon the national economy and by common sense.

5. Petitioner relies principally, if not wholly, upon an alleged administrative construction to circumvent the plain language used by, and the obvious intent of, the Congress in enacting Section 13 as part of the 1899 Act. As hereinafter shown in Section V, *infra*, Petitioner fails to establish the administrative construction upon which it relies. However, were there any substance in, or could any weight be given to, Petitioner's alleged administrative construction and its alleged approval *in 1954* by a single committee of one House of the Congress, then such administrative construction plainly and conclusively establishes that Section 13 is the only section of the 1899 Act which is applicable to the acts of any of Respondents and, consequently, that Section 10 is inapplicable to such acts.*

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* See footnote opposite.

II. INTERLAKE'S ACTS DO NOT VIOLATE SECTION 13 OF THE 1899 ACT, 33 U. S. C. 407.

The first clause of Section 13 of the 1899 Act (33. U. S. C. 407) provides:

> "That it shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, *any refuse matter of any kind or* description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, * * *" (Pet. Br. App. A, 48).

Plainly, the phrase, "other than that flowing from streets and sewers and passing therefrom in a liquid state," is an exception which excludes everything within its scope

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* Petitioner seeks to establish its alleged administrative construction by drawing dubious and, as we believe, erroneous inferences from papers which Petitioner terms "administrative and congressional materials." (Pet. Br., App. C 64; 65-99.) These "materials" include excerpts from numerous unpublished letters, from reports made long after 1899 in connection with legislation in another field and from a *1954* hearing and report on an appropriation bill. Petitioner frequently misconceives or misstates their contents or meaning (e.g. *infra*, 66-7). Only very limited references can be made to such material in Interlake's argument without destroying its continuity; and such "materials" are examined briefly, but more fully, in Section V, *infra*.

If the Government can properly rely, or a case can properly be decided, upon such "materials," then neither a citizen nor his lawyer can determine the law by reading the criminal statutes, their judicial construction and their legislative history; for their meaning will ultimately depend upon such things as unpublished and voluminous correspondence (unknown and inaccessible to the citizen or his lawyer) which rests in the archives of some federal department. The congressional declaration that the United States Code shall establish *prima facie* all general and permanent laws of the United States will be a dead letter. (Act of Dec. 7, 1925, Part I, 44 Stat. 1.)

from the prohibitions of the first clause of Section 13.* With respect to the claim against Interlake, the sole issue is whether Interlake's sewer effluents, which are not less than 99.98% *water* but contain a small unreclaimable amount of fine material in suspension or solution, fall within the foregoing exception.

A. Petitioner's Construction of the Exception Incorporated in Section 13 Is Precluded by the Circumstances Surrounding Its Enactment, by Its Disastrous Consequences and by Legislative History.

Petitioner conceded in the court below, and does not now deny, that not only during and prior to 1899 but also "throughout our history navigable waters have been used not only for navigation but also for manufacturing, for domestic purposes and for the disposal of domestic and industrial trade wastes." (R. 2573.) Such non-navigation uses have been and are of incalculable value to the national economy. In creating the exception to section 13, the Congress was exercising its exclusive constitutional authority under the commerce power to balance the interests of navigation and the interests of citizens, municipalities and the nation in the ordinary and necessary uses of the waters of navigable streams for manufacturing and for the disposal of street runoffs and of domestic and industrial wastes. *E.g.*, see *Gilman v. Philadelphia*, 3 Wall. 713, 729; *Southern Pacific Co. v. Olympian Co.*, 260 U. S. 205, 209-10; *Greenleaf Lumber Co. v. Garrison*, 237 U. S. 251, 268; Cf. *Pennsylvania v. Wheeling Bridge Co.*, 18 How. 421, 430, 432; *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 64.

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* This case does not involve: (1) The second clause of Section 13, which prohibits the deposit of refuse matter in any place

(Continued on following page.)

A statute must be construed in the light of the facts, circumstances and conditions which existed at the time of its enactment; for the meaning of the words of a statute must be closely related to the circumstances of their use. *Great Northern Railway Co. v. United States*, 315 U. S. 262, 273; *United States v. Stewart*, 311 U. S. 60, 69; *United States v. Missouri Pacific R. Co.*, 278 U. S. 269, 278-9. Similarly, the words of a statute are to be given their customary meaning in common and everyday usage at the time when the statute was enacted.

Prior to the enactment of Section 13 of the 1899 Act, special or general statutes dealing with the same subject matter had been enacted in 1886, 1888, 1890 and 1894. *Infra*, 31. In 1900, when the total urban population was 30,400,000, only communities with an aggregate population of 1,000,000 or less than 3½% of the total urban population, provided any treatment whatever for their domestic and trade wastes.* (R. 2571-2.) The domestic and trade wastes of the remaining urban communities were discharged without any treatment into the nearest body of water. Domestic and trade wastes discharged from these urban communities carried large quantities of

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(Continued from preceding page.)

on the bank of a navigable stream or of a tributary thereof where it is liable to be washed into such navigable water so as to impede or obstruct navigation; or (2) the second proviso of Section 13 which authorizes designated federal officers to issue permits for the deposit of refuse matter in navigable waters. (Pet. Br. App. A, 48-9.) Plainly, this clause does not require, or authorize issuance of, permits for any acts which are excluded from the prohibitions of Section 13 by the exception incorporated therein.

* In 1890 the population of communities which provided any treatment whatever for their domestic and trade wastes was only 100,000. *Modern Sewage Disposal* (1938), p. 13, *Table I*, published by the Federation of Sewage and Industrial Waste Associations, Langdon Pearse, Editor, 50th Anniversary Book, Lancaster Press, Inc.

solids in suspension and in unstable or impermanent solution.* (R. 2571-2.) As late as 1938, the street runoffs and the domestic and industrial or trade wastes from a population of roughly 40,000,000 were discharged into natural water courses without treatment and wastes from much of the remaining population received scant treatment. (*Modern Sewage Disposal*, p. 191.)

The foregoing are some of the relevant facts, conditions and practices which existed throughout the United States when Section 13 of the 1899 Act and prior special or general Acts dealing with the same subject matter were severally enacted. Throughout this period a statute, which prohibited the discharge of street runoffs or of domestic and trade wastes flowing from sewers so long as they carried any solids in suspension or impermanent solution, would have outlawed the method universally used for the disposal of such wastes (*supra*, 29), and would have brought urban life and industrial activity to a standstill throughout the nation. Even today the result would be little less disastrous. Plainly, only the most clear and compelling statutory language could justify imputing such an egregious intent to the Congress.

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* Even complete treatment of domestic and trade wastes does not remove a substantial part of the suspended solids. The Interstate Compact to control pollution of the Ohio River System requires that, within a reasonable time, wastes "shall be so treated * * * as to provide for substantially complete removal of *settleable solids*, and the removal of not less than forty-five percent (45%) *of the total suspended solids.*" *Dyer v. Sims*, 341 U. S. 22, 24. The foregoing emphasizes that the flow from sewers carrying industrial and/or domestic wastes or street runoffs could never under any circumstances be free from solids carried in suspension or in unstable solution. In water and sanitary engineering "settleable solids" are those suspended solids which will settle in quiescent water within a given period of time, usually two hours. *Glossary, Water and Sewage Control Engineering* (1949), p. 209.

The first legislation dealing with this subject (enacted August 5, 1886) was a special act which prohibited the dumping of "any ballast, stone, slate, gravel, earth, slack, rubbish, wreck, filth, slabs, edgings, sawdust, slag, or cinders, or other refuse or mill-waste of any kind, into New York Harbor." (24 Stat. 310, 329-30.) Undoubtedly when this special Act was passed, no one supposed that it could apply to street runoffs or to domestic and industrial waste carried in suspension in sewer outflows. However, in 1888 this special statute was superseded by the special Act of June 29, 1888 (25 Stat. 209; now 33 U. S. C. § 441), which incorporated language reading "any other matter of any kind, other than that flowing from streets, sewers, and passing therefrom in a liquid state" as an exception to its prohibitions.

The first general act on the subject prohibited dumping into navigable waters "any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, slag, cinders, ashes, refuse, or other waste of any kind * * * which shall tend to impede or obstruct navigation." Section 6 of the Rivers & Harbors Act of 1890, 26 Stat. 426, 463. In 1894 this Act was superseded by Section 6 of the Rivers and Harbors Act of August 18, 1894 (28 Stat. 338, 363), which added language reading "any other matter of any kind other than that flowing from streets, sewers, and passing therefrom in a liquid state" as an exception to its prohibitions.

As already shown (*supra*, 22-4), sections 9 through 20 of the Rivers and Harbors Act of March 3, 1899, were a comprehensive revision of all general laws relating to the protection of navigable waters (30 Stat. 1121, 1151-5). Section 13 of that Act (33 U. S. C. § 407) omitted the enumeration of specific forms of refuse matter and in general

terms prohibited the discharge or deposit of "any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state."

When Congress amended the special act of August 5, 1886 and the general act of September 19, 1890 so as to regulate the discharge or deposit of refuse matter in such general terms as conceivably might be construed to apply to street runoffs and to domestic and trade wastes carried in suspension or unstable solution in liquids flowing from sewers, the Congress simultaneously inserted in each act an exception which, in slightly varying language, excluded refuse, waste, or any other matter flowing from streets and sewers and passing therefrom in a liquid state. When Congress, in 1899, enacted a new general law regulating this subject matter in general terms, the Congress carefully and deliberately inserted in Section 13 the exception involved in this case.

The only reasonable inference is that the Congress inserted this exception in Section 13 and in such prior acts for the precise purpose of making inescapably clear that the statutes would not outlaw the existing practices with respect to the disposal of street runoffs and of domestic and trade wastes flowing from sewers into navigable streams; and the consequences of a contrary interpretation, we believe, make that inference conclusive and irrebuttable. As hereinbefore shown, street runoffs and domestic and trade wastes flowing from sewers, whether or not treated, inevitably carry solids in suspension or solution (*supra*, 29-30). Section 13, as interpreted by the trial court and by Petitioner in both lower courts (see *infra*, 34-7), would absolutely prohibit any discharge of street runoff or of domestic and trade wastes flowing from sewers into navigable streams.

Under the construction advanced by Petitioner in this Court, Section 13 would absolutely prohibit the discharge of street-run-off or refuse matter flowing from sewers in a liquid state even though there is not and could not be any adverse effect on navigable capacity however slight. (Pet. Br. 20.) Since practically all municipal sewers carry some industrial waste, the result of accepting Petitioner's new interpretation, urged for the first time in this Court (*infra*, 37-8), would be little, if any less, disastrous; and it is no more defensible than the interpretation urged by Petitioner in both lower courts.

In the light of legislative history and of the conditions and circumstances existing when Section 13 was enacted, the statute can not, we believe, reasonably be construed as prohibiting the discharge of liquids which carry any refuse matter in suspension or in unstable solution. Acceptance of either of Petitioner's interpretations would require this Court to legislate in a field in which the constitutional power of Congress is exclusive. If the exception is to be given any force or effect, liquids, which carry refuse matter only in suspension or unstable solution, must come within the exception.

B. Both the Construction of Section 13 Urged by Petitioner in the Courts Below and That Now Urged in This Court Disregard the Normal Meaning of the Congressional Language, Deprive It of Any Practical Effect, and Render It Mere Surplusage.

It is a settled principle that meaning must be given to every word, phrase or clause of a statute. *Ginsberg & Sons v. Popkin*, 285 U. S. 204, 208; *Market Co. v. Hoffman*, 101 U. S. 112, 115; *Ex Parte Public National Bank of New York*, 278 U. S. 101, 104. The words of the exception must

be given their normal, non-technical meaning in ordinary usage at the time when section 13 was enacted. Moreover, the courts will not construe a statute so as to render part of its language surplusage.

In both lower courts the position of Petitioner, in seeking to establish a violation of Section 13, was that the exception does not apply to sewer outflows which contain *any refuse matter whatsoever in suspension or other than in permanent solution.* Petitioner persuaded the trial court to adopt that interpretation (R. 104, 108, Fdg. 33, Concl. 3); but the Court of Appeals rejected it. While Petitioner principally relies in this Court upon a new interpretation, Petitioner seemingly continues its interpretaton urged in both courts below. (Pet. Br. 33.) This interpretation attributes to the Congress an intention (when enacting a general statute and making its violation a criminal offense) to make a refined, unexpressed and unworkable distinction between material in solution and material in suspension and to prohibit the discharge of sewer outflows carrying any material in suspension even though it is so fine that it could not be removed by screening or by any other then known and economically feasible method. The gross improbability that Congress intended to incorporate in any statute, and *a fortiori* in a criminal statute, such a refined and nebulous standard of illegality is alone sufficient to condemn Petitioner's interpretation.

If the exception does not permit discharge of liquids which contain any material in suspension or impermanent solution, then discharges permitted by the exception are limited to pure water—something which does not exist in any sewer outflows or even in streams and lakes in a state of nature. So construed the word "liquid" would be

given an unnatural, if not wholly erroneous, meaning. Unless "liquids" flowing from streets and sewers carry "refuse matter" of some kind or description, no exception was needed to take them out of the statute. By excepting refuse matter "flowing from streets and sewers and passing therefrom in a liquid state," the Congress must have intended to accomplish some practical and substantial result. It cannot be assumed that the Congress intended to do an idle thing by creating a wholly illusory exception which, in fact, could never have any application.* Indisputably, refuse matter carried in suspension by street run-offs consists almost wholly of solids which are not soluble; and a substantial part of refuse matter carried in suspension by the outflow of sewers carrying domestic or trade wastes (or both) consists of solids which are not soluble. (*Supra*, 29-30.) Plainly, therefore, the construction of Section 13 urged by Petitioner and adopted by the District Court would deprive the exception of all practical meaning and effect and would render it mere surplusage.

The Congress did not use the phrase "in a liquid state" with some abstruse technical meaning. In common usage dirty water and other naturally flowing liquids are "in a liquid state" although scientific analysis would show

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* Much of the material carried in suspension by the outflow of Interlake's sewers is so fine that it will never settle out and is at least tantamount to being in permanent solution (*supra*, 6; R. 1047-8). Even when deposited on the river bottom this fine material "behaves exactly like a liquid" (R. 2215). Some of such materials are constantly in suspension (R. 1326). An experienced engineering consultant on stream and river pollution testified that such solids as existed in the Interlake sewer effluents were in a liquid state (R. 2101). No tests were made as to whether the flue dust would flocculate (R. 1301-2). Moreover, formations resulting from flocculation are so flimsy and web-like with relatively large interspersed spaces as to have no practical significance.

that such liquids carry some solids in suspension or in unstable physical or chemical solution. The subject matter with which the Congress was dealing and the facts and circumstances in relation to which the congressional language was chosen confirm the normal inference that the language of the exception was chosen and used by Congress in its ordinary and popular meaning.

In *Joint Committee of the River Ribble v. Halliwell*, 2 Q. B. 385 (1899), the English Court of Appeal, in holding that defendant had not violated the (English) Rivers Pollution Prevention Act (1876), said:

> "The first question involved depends on the true construction of s. 2 of the Act. That section provides that every person who puts, or causes to be put, or to fall, or knowingly permits to be put, or to fall, or to be carried into any stream, so as to pollute its waters, any (among other things) 'putrid solid matter,' shall be deemed to have committed an offence against the Act. * * * What are the facts as to the matter which the defendants put into the river? I am not sure, as I have said, that on the evidence it was ever solid, but the evidence is clear that, whatever it may have been, at the time when it was put into the river it was 97.6 per cent. water and 2.4 per cent. solid matter. That being so, I ask myself whether any one, *according to the ordinary use of language*, would call it solid matter when it first got into the river. I cannot bring myself so to call it." (l. c. 388-9.)

In deciding that case (below) the Lord Chief Justice, whose decision was affirmed on appeal, had said:

> "Without going minutely into the figures * * * I find * * * that a sample of the effluent, taken by the appellants as it was going into the stream, contained 97.6 per cent. of water and 2.4 per cent. of solid. Now I ask myself can that be said to be solid matter

within the meaning of the Act? The Act makes an emphatic difference between solid and liquid matter; and I think that, *judged by the common sense and ordinary meaning which people put upon language of this kind*, and I see no reason why any other meaning should be put upon it, no person could be found to describe a body of which 97.6 per cent. was water, and the remaining 2.4 per cent. solid, as being solid matter. He would say it was effluent water carrying along with it and in suspense with it 2.4 per cent. of solid matter. If that be so, what was carried was solid matter in suspension and does not come within the provisions of this Act." (l. c. 391)

Recognizing the impossibility of supporting an interpretation which would deprive the exception of any force or effect and read it out of the statute, Petitioner now shifts to an equally erroneous interpretation that the exception "*seems clearly*" to mean only refuse matter which "is normally defined as sewage" (Pet. Br. 33). This new interpretation, urged for the first time in this Court, would, if adopted, require this Court to disregard and to do violence to the unambiguous statutory language.

As Petitioner itself stresses (Pet. Br. 32), Congress defined the subject matter of Section 407 in sweeping and all-inclusive language which includes "any refuse matter *of any kind* or description whatever." However, Petitioner conveniently overlooks the fact that, in creating the exception reading "other than *that* (i.e. refuse matter of any kind or description whatever) flowing from streets and sewers and passing therefrom in a liquid state," the Congress used equally sweeping and all-inclusive language. Plainly, Congress did not make the applicability of the exception in any way depend upon the kind or source of "refuse matter" passing from sewers in a liquid state. In-

deed, Section 13 expressly refers to refuse matter from "any * * * manufacturing establishment, or mill of any kind." Nothing in the congressional language or in legislative history supports Petitioner's bald assertion that the all-inclusive language of the exception "*seems clearly*" to mean only refuse matter which "is normally defined as sewage." (Pet. Br. 33.) Both before and since 1899 municipal sewers commonly carried both domestic and trade refuse matter. E.g. see Pet. Br. App. C, 77-8, H. Doc. 417, 69th Cong., 1st Session (1926).

Petitioner seemingly attempts to support its effort to emasculate the exception by citing (Pet. Br. 33) "*illustratively*," *Sanitary District of Chicago v. Chicago Packing Co.*, 241 Ill. App. 288 (1926). That case merely involved the construction of State statutes which authorized diversion of the "drainage and sewage of the City and its environs" (l. c. 302) into the watershed of the Illinois River, in order to purify such wastes by dilution with water diverted from Lake Michigan. In overruling a general demurrer to a complaint which sought to enjoin defendants from dumping certain kinds of packing house wastes into the drainage canal, the criterion, which the state court applied in construing the state statutes, was whether, by dilution and oxidation in the flowing water of the drainage canal, certain wastes could be rendered harmless to the public health. Thus, the Court held that the defendants were authorized to discharge into the river and drainage canal their trade wastes which could "be diluted and oxidized by the water flowing in the channel through the Chicago River and sewers" but were not authorized so "to dispose of garbage, bones, parts of dead animals and other solid matters, unless they be diluted and oxidized by the water." (l. c. 298-9.) Plainly, the case is wholly inap-

posite, both on its facts and the law, to any construction of Section 13.*

It is not without significance that, although section 13 and its predecessors have been in force for over 70 years, no decision other than that of the trial court can be found in which it has been held that section 13 prohibits the discharge of street runoff and of domestic and trade wastes carried in suspension by liquids flowing from sewers into navigable waters. *Missouri v. Illinois,* 180 U. S. 208; *Missouri v. Illinois,* 200 U. S. 496; and *Wisconsin v. Illinois,* 278 U. S. 367; 281 U. S. 179; 289 U. S. 395, all involved the discharge of domestic and trade wastes into navigable waters. In none of these cases did the parties contend, or the court suggest, that section 13 was applicable. Could that section be construed as held by the district court, in each case the acts of the defendant State would clearly have violated that statute.

Former Chief Justice Hughes, in his report as Special Master in *Wisconsin v. Illinois,* 278 U. S. 367, held that Congress would have constitutional authority to regulate or prohibit the pollution of navigable waters by the discharge of domestic and trade wastes but stated:

> "The provisions of Section 13 of the Act of March 3, 1899 (* * * 33 U. S. C. 407) as to the deposit of

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* Disposal of putrescible "refuse matter" by dilution and oxidation of flowing water does not mean that it is consumed or dissolved in the water but only that it is rendered innocuous to public health. Even effluents of the most modern plants for the treatment of domestic and trade wastes contain solids in suspension. E. g., see *Dyer v. Sims,* 341 U. S. 22, 24, dealing with the treatment of wastes under the Interstate compact to control pollution of the Ohio River System. Packing house wastes are highly putrescible and, unless properly treated, create very offensive conditions. Any material carried in the effluents of Interlake's sewers is not only small in amount but also wholly inert and does not consume the oxygen dissolved in water.

refuse in navigable waters *excepted refuse* in a liquid state flowing from streets and sewers." (Master's Report at p. 167.)

As shown by the record in that case, former Chief Justice Hughes had heard the testimony of numerous water supply, sanitary and chemical engineers and of numerous Army Engineers. Manifestly, however, Mr. Justice Hughes did not believe that the exception in section 13 (33 U. S. C. 407) was inapplicable to liquids flowing from streets and sewers which contain some solids in suspension or in unstable solution.

Not less than 99.98% of the effluent of each of Interlake's sewers is water. Prior to discharge into the sewers, practically all the settleable solids have been removed from the river water by settling basins and, in some instances, by other processes and/or equipment. The material remaining in the effluents of Interlake sewers is in suspension or solution (*supra*, 6-7). To hold that the effluents of the Interlake sewers do not come within this exception, would completely nullify the exception and defeat the congressional intent.

C. Section 13 Affirmatively Authorizes Interlake's Acts.

Section 13 is a congressional determination that the discharge or deposit from any source of "refuse matter of any kind or description whatever * * * flowing from streets and sewers and passing therefrom in a liquid state" into any navigable waters, shall not constitute an interference with or an obstruction to navigation or navigable capacity *as a matter of law*. Such a congressional determination is conclusive. Consequently, even if suspended solids settling from such street run-offs or sewer outflows created an obstruction *in fact*, it would not be an obstruc-

tion *in law. Pennsylvania v. Wheeling Bridge Co.*, 18 Howard 421, 430, 432; *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 64; *Southern Pacific Co. v. Olympian Dredging Co.*, 260 U. S. 205, 209-10; *Greenleaf Lumber Co. v. Garrison*, 237 U. S. 251, 268.

Annual or periodic dredging is a necessary and inescapable element of the cost of maintaining navigation improvements, particularly those which have involved the deepening and widening of natural channels (*supra*, 19-20). Whether or not the discharge of street runoffs and of domestic and trade wastes flowing in suspension or unstable solution from sewers would significantly increase the amount of such annual or periodic dredging, Congress plainly believed either that it was equitable for the Government to bear any increased dredging cost or that the alternative would involve immensely greater loss to the national economy and to both national and local tax resources. That choice lay within the discretion of the Congress.

While Congress has constitutional power to enact a statute which would have the effect erroneously attributed to section 13 by the trial court and urged by Petitioner, Congress has not done so. Should Congress conclude to enact new legislation on this subject, it would necessarily again appraise and weigh the respective interests of navigation, industry, trade, municipalities and the nation in the ordinary and necessary uses of the waters of navigable streams. (R. 2566.) However, it is, we submit, incredible, that Congress would embody in any new legislation the theoretical and extreme concept adopted by the trial court and urged by Petitioner and thereby completely destroy the balance between the uses of the waters of navigable streams for navigation and non-navigation

purposes which has existed and has been preserved by Congress throughout our history as a nation.

The circumstances that the second proviso of Section 13 authorizes the Secretary of the Army to issue permits for the deposit of material in navigable waters (Pet. Br. 36) casts no light upon the interpretation of the exception; for manifestly no permit is required or authorized for the discharge of sewer effluents which that exception excludes from the prohibitions of Section 13. Petitioner's argument that, to construe the exception as authorizing or permitting the discharge of sewer effluents which are *99.98% water but carry in suspension a small quantity of fine unreclaimable material,* would authorize the discharge of ballast, dredgings and sludge so long as such materials are discharged through a pipe (presumably by hydraulic dredging or force pumping), is fanciful. (Pet. Br. 33-4.) On the other hand, Petitioner's interpretation would deprive the exception of any application.

III. ASSUMING SECTION 10 OF THE 1899 ACT (33 U. S. C. 403) WERE APPLICABLE, INTERLAKE'S ACTS WOULD NOT VIOLATE THAT SECTION.

Section 10 of the 1899 Act, with its three clauses separated by parenthetical insertions, is set forth below:

> "[Clause 1] That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; [Clause 2] and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established,

except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; [Clause 3] and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same."

With respect to the alleged applicability of Section 10 to the separate claim against Interlake, the material facts are: Not less than 99.98% of the effluent of each sewer of Interlake is water: These effluents carry small amounts of valuable but non-recoverable fine materials in suspension or impermanent solution, some of which settles out and deposits at fortuitous times in a privately owned slip, outside of the navigation channel and partially in the navigation channel. Interlake has voluntarily and regularly dredged in front of its plants and in its private slip which dredging also substantially contributes to the maintenance of the navigation channel.

First: Since Petitioner did not contend below, and does not here contend, that the second clause of Section 10 has any application, the interpretation of that clause is not here involved. (R. 2569.)

Second: The third clause of Section 10 makes it unlawful "to excavate or fill" or in any manner "to alter or modify the course, location, condition, or capacity * * * of the channel of any navigable water of the United States," unless the "work" has been recommended and authorized by the designated federal officers. In common usage the words "to excavate" and the words "to fill" mean an ex-

cavation or fill which is deliberately and purposefully made by a riparian owner to accomplish a planned objective. Excavations are normally made to improve or to provide access from the shore, a dock, or a wharf to a navigable channel or, either alone or in connection with dams, to divert water from a navigable water for non-navigation uses. Fills are normally made either in connection with wharfing out to the navigable channel or for the purpose of converting submerged land outside of the navigation channel into fast land which can be profitably used by the riparian owner. Illustratively, riparian owners may fill in front of their land so long as they do not interfere with navigation or the navigable channel and, when harbor lines have been established, they may make such fills as they deem beneficial outside (landward) of such harbor lines. 33 U. S. C. 404; *Mutual Chemical Co. v. Mayor and City Council* (D. C. Md.), 33 F. Supp. 881 at 884 (modified on other grounds, 122 F. 2d 385); *United States v. Martin* (App. D. C.), 177 F. 2d 733, 734; *United States v. Groen* (D. C. D. C.), 72 F. Supp. 713, 721.

Moreover, "to excavate or fill" is defined by the statute as "*the work*," which must be recommended and authorized by the specified officers. The subsequent settlement of some of the fine material carried in suspension or solution by water flowing out of sewers at fortuitous locations in the River would not constitute "a fill" or "a work" in any normal meaning or use of those words. On the other hand, works consisting of planned fills were and are commonly undertaken by riparian owners in front of their lands and also by the Government. Manifestly, the only reasonable inference is that the Congress used these words in their normal and commonly accepted meaning and not in the strained, abnormal and (so far as we are informed)

unknown meaning which plaintiff seeks to attribute to them.

Furthermore, assuming arguendo that Section 13 of the 1899 Act (33 U. S. C. 407) did not exclusively govern the validity of Interlake's acts, Sections 10 and 13 of the 1899 Act are at least *in pari materia*; and under well settled principles must be construed together. Manifestly, it would be inadmissible to attribute a strained and abnormal meaning to the words "to excavate or fill" or to the term "the work" as used in the third clause of Section 10 in order to bring within that clause acts that are specifically and expressly regulated in Section 13 which also authorizes specified federal officers to issue a permit to make deposits of a kind or in a situation where, but only where, the deposits would otherwise violate Section 13. As Petitioner concedes, wherever the Congress has delegated to designated officers authority to issue permits for any act, such acts are "affirmatively authorized by Congress" upon the issuance of the permit; and what is done under the permit is lawful even though it creates an obstruction to navigation or navigable capacity. *Southern Pacific Co. v. Olympian Dredging Co.*, 260 U. S. 205, 209-10.

Third: The first clause of Section 10 prohibits "the creation of any [unreasonable] obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States." *Wisconsin v. Illinois*, 278 U. S. 367, 413. Petitioner contends that the word "creation" applies to any deposit from the small amount of valuable and fine, but nonrecoverable, materials carried in suspension by effluents of Interlake's sewers, which occurs at fortuitous times and places, principally in a private slip or outside of the navigation channel but also partially in the navigation channel. In normal usage and understand-

ing the word "creation" conveys no such meaning. Instead, it conveys the meaning that something has been purposely done to create for permanent use something which constitutes the alleged obstruction. Nothing in the circumstances surrounding the passage of the 1899 Act or in its legislative history justifies an assumption that in 1899 the Congress used the word "creation" in any artificial or abnormal sense. Moreover, since Sections 10 and 13 of the 1899 Act are at least *in pari materia* that circumstance precludes giving the word "creation" in Section 10 any such artificial meaning for the reasons stated in our discussion of the interpretation of the third clause of Section 10, *supra*, 43-5.

Apart from the decision of the trial court in the instant case, all prior decisions have held that the language of the first clause of Section 10, and the like language in the first clause of Section 10 of the 1890 Act (Pet. Br., App. A, 46), applies only to obstructions of a permanent character which have been purposely "created" by the usual modes of construction to accomplish or serve an objective for which the alleged obstruction will be used. *United States v. Wilson* (2nd Cir., 1956), 235 F. 2d 251, 252-3; *United States v. Drainage District No. 3* (D. C. Tex. 1925), 2 F. 2d 861, 862; *United States v. Burns* (C. C. W. Va. 1893), 54 Fed. 351, 363; *In Re Eastern Transport Co.*, (D. Md. 1952), 102 F. Supp. 913, 915. Cf. *Loud v. United States* (6th Cir., 1923), 286 Fed. 56, 59.

United States v. Drainage District No. 3 (D. C. Tex. 1925), 2 F. 2d 861, was an action to abate a deposit in a navigable stream which had been and was being caused by a drainage ditch. Negligent and faulty construction had increased the size of the deposit. The Government conceded that no action could be maintained at common law but contended that the deposit violated Section 10 and

that its removal was authorized by Section 12 of the 1899 Act. (l. c. 861.) In denying relief upon the ground that those sections were inapplicable, the Court said:

> "That these statutes prohibit the erection of structures in navigable streams, unless the plans therefor have been approved by the War Department, and authorize the removal of such structures placed without such approval, is plain. That they do not apply to washing or erosion caused by drainage, and that the prohibitory features of the statutes cannot be distorted so as to cover the operations of drainage districts, is equally plain." (l. c. 862.)

In *United States v. Burns* (C. C. D. W. Va. 1893), 54 Fed. 351, the Court granted a motion to quash a count of an indictment which alleged a violation of Section 10 of the Rivers and Harbors Act of 1890 (26 Stat. 426, 454) (a predecessor of Section 10 of the 1899 Act) which prohibited the "creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any" navigable waters. The alleged violation consisted of throwing and placing rafts, logs, sticks, boats and other objects in a navigable river (l. c. 362). In holding Section 10 of the 1890 Act inapplicable, the Court said:

> "I think that the obstructions contemplated by the tenth section—those that have not been affirmatively authorized by law, and are therefore prohibited—are such obstructions as are permanent in their nature, as are created for special purposes, by the usual modes of construction." (l. c. 363.)

Neither the *Drainage District* case nor the *Burns* case can be brushed aside by bald assertions. (Pet. Br. 20, fn. 7.) The relevant language of the first sentence of Section 10 of the 1890 Act, which was construed in the *Burns* case, did not differ from the comparable language in the first clause of Section 10 of the 1899 Act. (See Pet. Br.,

App. A, 46, 47.) Petitioner misconceives or misstates the holding in *United States v. Wilson*, 235 F. 2d 251 (Pet. Br. 20, fn. 7, 24). That decision held that, although the sunken barge was or might be an obstruction to navigation, it was not an obstruction covered by Section 10 (33 U. S. C. 403) or a structure covered by Section 12 (33 U. S. C. 406) for precisely the same reason that those sections do not apply to Interlake's acts. Indeed, Petitioner in substance concedes that the decision in the *Wilson* case was correct. (Pet. Br. 24.)

On this point Petitioner relies primarily on its interpretation of *Sanitary District v. United States*, 266 U. S. 405 and *Wisconsin v. Illinois*, 278 U. S. 367. As before noted, common purposes for making "excavations" and constructing dams in navigable water include diversion of water. Both cases involved (1) the excavation of the entire channels of the Chicago and Calumet Rivers as part of an elaborate system of works for reversing and diverting the natural flows of those rivers plus additional water from Lake Michigan as part of a scheme for disposing of the industrial and domestic wastes of Chicago, and (2) the building of numerous structures in those streams which were necessary or desirable features of the scheme. Permits for such excavations and the building of other structures were issued on July 3, 1896, November 16, 1897, November 30, 1898, January 30, 1899, May 8, 1899, May 12, 1899, July 11, 1899, July 11, 1900, April 9, 1901, July 23, 1901, December 5, 1901, January 14, 1902, January 17, 1903, September 11, 1907, June 30, 1910 and March 3, 1925.*

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* The permits issued on and prior to June 30, 1910 are printed at pages 81-7 and 93-5 of the Appendices of a "Report on the Sanitary District of Chicago," which was published in 1924 by the Secretary of War on the recommendation of the Chief of En-

(Continued on next page.)

That the excavations of the entire navigation channels of the Chicago River, of some of its tributaries and of the Calumet River, and the building of structures therein, all for the purpose of diverting their flows plus water from Lake Michigan, were works, for which a permit was required by Section 10 of the 1899 Act, was not and could not be challenged. All permits issued for such excavations and structures in the Chicago River (beginning July 3, 1896) and subsequently in the Calumet River included a condition that each permit did not constitute approval of any diversion of water from the Rivers or Lake Michigan and expressed grave doubts that such approval could be granted except by Congress. When subsequent permits were granted to use such excavations and structures for diversion of water, a limitation upon the amount of water to be diverted was incorporated as a condition of each permit. The power to incorporate such conditions was clearly included in the authority granted to the federal officers; and such excavations and structures were lawful only so long as the Sanitary District complied with such conditions. The authority to approve includes the power to disapprove and the power to disapprove necessarily includes the lesser power to condition the approval. *Southern Pacific Co. v. Olympian Co.*, 260 U. S. 205, 208.

As appears from the foregoing permits, elaborate drainage works involved in those cases included excavations of the entire navigable channels of the Chicago River and its branches and of the Calumet River for the purpose

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(Continued from preceding page.)

gineers. Some of the foregoing permits issued prior to June 30, 1910 and all of such permits issued subsequent to that date are printed in the Report of the Special Master in *Wisconsin v. Illinois, Michigan v. Illinois* and *New York v. Illinois*, Nos. 7, 11 and 12 Original, October Term 1927, Supreme Court of the United States.

of diverting their natural flows plus additional water from Lake Michigan, and the construction of numerous structures in those streams, all of which clearly came within the provisions of Section 9 or Section 10 of the 1899 Act and also, as confirmed by the language of many of the foregoing permits, constituted "a work" within the express and unambiguous language of Section 10. Obviously those decisions are a far cry from holding that the deposit of small amounts of valuable, but nonrecoverable, fine materials carried in suspension or solution in sewer effluents which are not less than 99.98% water, violates Section 10 of the 1899 Act, or that the validity of such acts is governed by that section instead of by Section 13 of the 1899 Act.

Petitioner also quotes a few words out of context from the opinions of these two cases of *Sanitary District v. United States*, 266 U. S. 405, 429, and *Wisconsin v. Illinois*, 278 U. S. 367, 405, 412 (Pet. Br. 22, 23), from which it argues that every provision of the 1899 Act must be construed as extending federal control beyond existing law. Examination of the context, from which Petitioner wrenched the words quoted from each opinion, clearly shows that such words were used solely with reference to the fact that, in the 1899 Act, Congress changed the phrase in the 1890 Act reading "not affirmatively authorized *by law*" to read "not affirmatively authorized *by Congress*" with the intent of making "mere State authorization inadequate"—a change in existing law not here relevant. The error in this argument is self-evident.

Neither the relevance nor logic of Petitioner's arguments based on *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, is discernible to Interlake. (Pet. Br. 10, 21, 63-4.) In that case this Court held that, there being no federal

common law, the United States could not maintain an action to abate a partially constructed bridge and enjoin further construction (l. c. 5) in the absence of a directly applicable federal statute (l. c. 8). Undoubtedly *one* purpose of Congress, in enacting *Section* 7 of the Act of September 19, 1890 (26 Stat. 45, amended by Section 3 of the Act of July 3, 1892 (27 Stat. 88)) was to regulate the construction of bridges over federal navigable waters; and such prior regulation of that subject matter was superseded by *Section 9* of the 1899 Act, 33 U. S. C. 401, and Section 12 of the 1899 Act, 33 U. S. C. 406, which expressly authorizes an equitable proceeding to compel the removal of any bridge erected in violation of Section 9 of the 1899 Act. Petitioner does not explain how the legislative history of congressional regulation of the construction of bridges over navigable streams casts any light upon the proper interpretation of Sections 10 and 13 of the 1899 Act, and, manifestly, it does not.

IV. HAD PETITIONER ESTABLISHED A VIOLATION OF SECTION 10 OR OF SECTION 13 OF THE 1899 ACT, THE STATUTORY REMEDIES CREATED AND PROVIDED BY CONGRESS FOR THEIR VIOLATION ARE EXCLUSIVE AND DO NOT AUTHORIZE THE RELIEF SOUGHT IN THE TRIAL COURT OR BELATEDLY IN THIS COURT.

A. Neither Section 10 Nor Section 13 Purports to Impose Upon Private Interests Any Duty to Dredge or Maintain Navigable Streams or Channels.

As Petitioner conceded in the Court of Appeals (Pet. Br. Below 113) and substantially concedes in this Court (Pet. Br. 44), annual or periodic maintenance dredging is a necessary part of the cost of maintaining navigation improvements and has been financed by congressional

appropriations throughout our national history. Manifestly, neither Section 10 nor Section 13 of the 1899 Act purports to impose upon a violator any affirmative duty to dredge but, instead, merely imposes a negative duty to refrain from doing the prohibited acts.

Congress deliberately selected and created the remedies which it deemed appropriate for violations of the respective Sections of the 1899 Act. Nevertheless, Petitioner contends that this congressional choice of remedies should be disregarded upon the theory that, notwithstanding the clear statutory language, Congress could not have intended, or in any event should not have provided, that the Government should bear such increase, if any, in the cost of normal maintenance dredging as might result from the settling in navigation channels of some material carried in suspension by sewer effluents coming within the exception to Section 13. One fundamental fallacy in this contention is that Congress, in creating the exception to Section 13, necessarily determined that the national interest would be better served by the Government bearing such increase, if any, in the cost of maintenance dredging as might result from that exception than by hazarding irreparable damage to the national economy and to national and local tax resources which would be the probable, if not certain, result of outlawing traditional and essential non-navigation uses of navigable waters.

B. The Only Claims Which Petitioner Can Assert Are Wholly Statutory; and the Statutory Remedies Created and Provided by the Congress Are Exclusive.

The Calumet River lies wholly within the State of Illinois. There is no federal common law applicable to obstructions and nuisances in streams which, although navigable interstate, are located wholly within a State; and,

with respect to such streams, no federal cause of action for injunction or for removal of an alleged obstruction or for damages allegedly caused thereby, can exist separate and apart from a violation of a directly applicable federal statute. *Willamette Bridge Co. v. Hatch*, 125 U. S. 1, 8, 9 (1888); *United States v. Bellingham Bay Boom Co.*, 176 U. S. 211, 217-8 (1900); *North Shore Boom Co. v. Nicomen*, 212 U. S. 406, 412 (1909); *United States v. Drainage District No. 3* (D. C. Tex.), 2 F. 2d 861, 862 (1925).*

Federal constitutional power to regulate, protect and preserve federal navigable waters is derived from the commerce clause and is vested exclusively in the Congress. *Gilman v. Philadelphia*, 3 Wall. 713, 725; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 701. The extent to, and the means by, which plaintiff can maintain an action to remove an alleged obstruction to navigation depends upon and is limited by the extent to, and the manner in, which the Congress has exercised its constitutional authority.

Any right of plaintiff to enjoin, abate or compel the removal of an alleged nuisance in navigable waters depends not only upon a proved violation of a directly applicable federal statute but also upon whether the remedies provided by the Congress for its violation include the form of relief sought.

Two fallacies running through Petitioner's argument on this point are contentions (1) that the duty imposed by Section 17 of the 1899 Act upon United States Attorneys (33 U. S. C. 413, Pet. Br. App. A, 50-2) to enforce the criminal and civil remedies created by the Congress in some unexplained way vests in the Attorney General a right to assert remedies which Congress did not see fit to

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* While Interlake limits this point to the facts of the instant case, it is settled that there is no federal common law.

create and (2) that, since no statute is necessary to authorize the Attorney General to bring an action to enforce a right of the United States, Petitioner may maintain any form of action known to the law, although not included in the remedies provided by the Congress in a statutory scheme that deals comprehensively, specifically and exclusively with subject matter over which Congress has exercised its exclusive power of regulation. (Pet. Br. 41-3.)

Neither Interlake nor any other Respondent contends, or ever has contended, that the Attorney General cannot maintain an action on behalf of the United States except pursuant to *special* statutory authority.

Manifestly, however, the right of the United States to maintain an action is not enlarged by either general or special authority of the Attorney General to conduct litigation on its behalf. Thus, in *United States v. San Jacinto Tin Co.*, 125 U. S. 273, this Court, in holding that no special statute was necessary to authorize the Attorney General to bring and maintain that suit (l. c. 284-5), stressed that whether the Government had a right to maintain the suit still depended upon whether it asserted a good cause of action for the relief sought (l. c. 285-6). The authority of the Attorney General is entirely irrelevant to the kind of action or remedy which Petitioner can maintain or assert.

C. The Remedies Created and Provided by the Congress for Violations of Sections 10 and 13 (33 U. S. C. 403 and 407) Do Not Authorize the Relief Sought by Petitioner Either Below or in This Court.

Sections 9 through 20 of the R. & H. Act of March 3, 1899 (30 Stat. 1121, 1151-5) were not limited to a comprehensive revision of the substantive provisions of all prior general laws for the protection of navigable waters.

Supra, 22-4. Those sections also created new criminal offenses and, in relation to some sections, provided new equitable remedies which completely supersede all provisions of such prior general laws that created criminal offenses or provided civil remedies for their violation. By Section 20 of the 1899 Act, Congress expressly repealed not only all inconsistent substantive provisions of such prior general laws but also all provisions of such laws which provided civil remedies or created criminal offenses. *United States v. Wilson* (2nd Cir., 1956), 235 F. 2d 251, 252-3.

In support of a seeming claim that the 1899 Act did not repeal either the substantive or enforcement provisions of Section 10 of the 1890 Act, Petitioner cites *United States v. Wishkah Boom Co.* (9th Cir., 1905), 136 Fed. 42. (Pet. Br. 23-4.) That action was brought in 1901 to compel defendant to remove a log boom (substantially a wing dam or series of wing dams) which defendant had built prior to passage of the 1899 Act in such a way as to prevent navigation at low tide and seriously obstruct navigation at other times. (l. c. 43, 45.) The Court noted that the provision of the 1899 Act, which repealed "all laws or parts of laws inconsistent with" Sections 10-20 of that Act, also provided that "no action begun, or right of action accrued, prior to the passage of this Act shall be affected by this repeal," and concluded that (the cause of action having accrued prior to repeal of the 1890 Act) both Acts were operative *"as far as the present case is concerned."* (l. c. 45.) Plainly, the case concerned only the construction and application of Section 10 of the 1890 Act and its self-contained remedies for its violation to a pre-existing cause of action and furnishes no support for Petitioner's argument. Moreover, a boom is one of the *structures* whose construction is specifically regulated by Section 10 of the

1899 Act for the removal of which, if illegally erected, an equitable remedy is expressly authorized by Section 12 of the 1899 Act.

In *Wisconsin v. Illinois*, 278 U. S. 367, this Court, after stating that the subjects formerly regulated by Sections 7 and 10 of the 1890 Act were regulated in Sections 9 and 10 of the 1899 Act, said:

> "A new classification was made in Sections 9 and 10 of the Act of 1899, and *substituted for Section 10 of the Act of 1890.*" (l. c. 412.)

The only criminal offense and civil remedy, which the Congress created and provided for the violation of Section 10 are set forth in Section 12 of the 1899 Act (33 U. S. C. 406). Section 12 provides that a violation of Section 10 shall be punishable by fine and/or imprisonment and authorizes any district court having territorial jurisdiction to compel, by mandatory injunction, "the removal of any *structures or parts of structures erected* in violation of" Section 10. Manifestly, the deposits found on the bottom of the River, which were allegedly caused in part by the incidental settlement of material carried in suspension or solution by the water flowing from Interlake's sewers, are not "structures or parts of structures." *United States v. Wilson* (2nd Cir., 1956), 235 F. 2d 251, 252-3. Consequently, even if (contrary to the fact) Section 10 were applicable and had been violated, the district court had no jurisdiction to enter the decree below against defendant Interlake for an alleged violation of Section 10 and would have no jurisdiction to grant the relief belatedly sought in this Court.

The only remedy, which Congress created, provided and authorized for a violation of Section 13 (33 U. S. C. 407) is set forth in Section 16 of the 1899 Act (33 U. S. C.

411). Section 16 provides that a violation of section 13 shall be punishable by fine and/or imprisonment but does not authorize any civil remedy whatsoever for a violation of that section. Manifestly, even if (contrary to the fact) respondent Interlake had violated section 13, the district court had no jurisdiction or authority to grant any of the relief against Interlake set forth in the decree below and would have no jurisdiction to grant the relief now sought. *Willamette Bridge Co. v. Hatch*, 125 U. S. 1, 8, 9 (1888); *United States v. Bellingham Bay Boom Co.*, 176 U. S. 211, 217-8 (1900); *North Shore Boom Co. v. Nicomen*, 212 U. S. 406, 412 (1909); *United States v. Wilson* (2nd Cir. 1956), 235 F. 2d 251, 252-3; *United States v. Drainage District No. 3* (D. C. Tex.), 2 F. 2d 861, 862 (1925).

Had Congress failed either to create any criminal offense or to provide any civil remedy for violations of sections 10 and 13, it might be arguable that the Congress intended, *sub silentio*, to authorize federal district courts to enforce these sections by some common law or equitable remedy. However, there is no room for such an argument here.

As shown *supra*, 22-3, the 1897 Report of the Secretary of War to Congress set forth first, a compilation of existing general laws and, second, a proposed Act Revising and Enlarging Laws For The Protection of Navigable Waters." (H. Doc. 293, 54th Cong., 2d Sess., 2-8, 8-13).*

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* With respect to the proposed Act, the letter of the Chief of Engineers, which was transmitted to Congress by the Sectary of War (App. 73-4), said:

> "The draft submitted covers *every subject embraced in the existing laws*, together with some additional subjects, except those authorizing the Secretary of War to make regulations for the navigation of Government canals and for the opening of drawbridges, which are comprehended in sec-

(Continued on next page.)

The proposed Act made substantial changes not only in the substantive provisions of all prior general laws but also in the remedies provided for their violation. This report was before the Congress for two years before enactment of the 1899 Act. In no situation could it be clearer that the selection, creation and provision of remedies for violations of the respective sections of the 1899 Act were intentionally and deliberately made by Congress. *Wheeler v. Greene,* 280 U. S. 49, 51. (See Op. Below R. 2576.)

In enacting sections 9 through 20 of the Rivers and Harbors Act of 1899, the Congress made a careful, discriminating and express selection of the means which it deemed appropriate for enforcement of each section of the Act. It made the violation of each substantive section a misdemeanor punishable by fine or imprisonment. It also created a limited equitable remedy for violation of some, but not all, sections. Illustratively, the Congress provided a limited equitable remedy for violation of section 10 but none for violation of section 13. The Congress repealed not only the substantive provisions, but also the criminal and remedial provisions, of all prior statutes which had dealt in whole or in part with the same subject matter as

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(Continued from preceding page.)

tions 4 and 5, respectively, of the act of August 17, 1894." House Doc. 293, p. 2.

After explaining that the forgoing sections had been omitted from the proposed Act because their existing forms were satisfactory, regulations promulgated thereunder had been "published at much expense" and their validity had been sustained by the courts," the letter stated:

> "Much care had been given by this office to the preparation of the draft submitted, and the views of some of the most experienced officers of the Corps of Engineers have been invited and considered in connection therewith. It is believed to be clear and free from ambiguity, and better adapted to conserve the important interests of commerce and navigation than the laws in their present form." House Doc. 293, p. 2.

did various sections of the Rivers and Harbors Act of 1899. To hold that the means so carefully selected by the Congress for the enforcement of each section of the 1899 Act are not exclusive would be for the courts to usurp the power of Congress to legislate under its exclusive constitutional authority to regulate interstate commerce.

The reasons, which impelled the Congress to choose varying means for enforcement of different sections of the Rivers and Harbors Act of 1899, are not here material. However, it should be noted that the omission of any equitable remedy for a violation of section 13 is consistent with the fact that dredging is a normal and inevitable element of the cost of maintaining navigable channels which the Government has borne throughout the history of federal navigation improvements (*Supra,* 19-20). Congress may also have given consideration to the practical difficulty, if not impossibility, of determining the extent to which numerous riparian owners, municipalities and nature have severally contributed to the creation of deposits found on the bottom of a navigable channel, which is strikingly emphasized by the case at bar.

We now review the arguments and authorities upon which Petitioner alternatively asserts a right to equitable relief or a right to recover, as damages, the "cost of dredging." (Pet. Br. 43-5.)

First: It is a complete answer to Petitioner's alternative claim of a right to recover damages from each Respondent that, as hereinbefore shown, the exclusive statutory remedies created by Congress do not include an action for damages. Indeed, the most that Petitioner says in support of this alternative claim is that, while the dredging of rivers and harbors is customarily financed by congressional appropriations, "it is appropriate" that each Respondent should stand the cost of such dredging as one of its operat-

ing expenses. (Pet. Br. 44.) Again, it is sufficient to point out that Congress, in balancing the national interest in maintaining navigation and non-navigation uses of navigable waters, determined otherwise. (*Supra* 28.) However, it may be noted that an equally plausible argument could be made that all users of navigable waters should stand their respective shares of the cost of improving and maintaining navigation improvements; for transportation costs are certainly one of the operating expenses of each. The decisions (cited Pet. Br. 44-5) holding that no specific statutory authority is required to enable the Government to bring actions to enforce its contracts and to protect specific federal property are so clearly inapposite as not to justify discussion.

Second: On the one hand, Petitioner asserts that the 1899 Act "codified" the 1890 Act without change; and on the other, that the 1899 Act was in *all respects* "an advance" upon the 1890 Act and, hence, that every provision of the 1899 Act must be construed as imposing broader prohibitions against, or greater restrictions upon, States and their citizens in making non-navigational uses of navigable waters. As shown *supra*, 22-4, 50, both assertions are plainly erroneous. Nevertheless, upon these erroneous and conflicting hypotheses, Petitioner argues that the phrase "structures or parts of structures" in Section 12 of the 1899 Act (Pet. Br. 39-40) must be held, by a process of Procrustean construction, to include any deposit resulting from the incidental settlement of fine non-recoverable material from Interlake's sewer effluents (not less than 99.98% of which is water) in a private slip, outside the navigation channel and partially within the navigation channel. That such a deposit would be called, or described as, a "structure" in any normal meaning of the word is inconceivable and that Congress used this word in a criminal statute

passed in 1899 with such an artificial and unknown meaning is even more incredible.

Petitioner's argument (Pet. Br. 42) that dirt or mud (more likely large rocks) might be used in building a structure such as a breakwater or dyke and, consequently, that the phrase "structures or parts of structures" should be construed to include the foregoing incidental and fortuitous deposits, is equally untenable. In 1899 the nature and permanent uses of such structures were well known to Congress and a matter of common knowledge. In Section 9 and in the second clause of Section 10 of the 1899 Act, Congress specifically regulated the building of a dike and breakwater and in Section 12 of the 1899 Act specifically created an equitable remedy to enforce the removal of any such structure erected in violation of Sections 9 or 10.

Third: As shown *supra*, 48-50, *Sanitary District v. United States*, 266 U. S. 405, is not controlling (Pet. Br. 41) but wholly inapposite. Similarly, *New York v. New Jersey*, 256 U. S. 296 involved the construction of works to divert all the domestic and trade wastes of the Passaic River watershed through a tunnel extending under Newark Bay and into Upper New York Bay. Plainly, the structures involved in each case could lawfully be built and maintained only under permits issued by the Secretary of War and in compliance with the conditions incorporated in such permits.

Fourth: Although stated less frankly than in the Court of Appeals (R. 2563, 2578), the argument on pages 42-3 of Petitioner's brief comes down to a claim that the Attorney General has inherent sovereign power "to seek an injunction" against anything which is, or which he deems to be, an interference with commerce. As shown *supra*, 54, the right of Petitioner to maintain this action

in no way turns upon the authority of the Attorney General to conduct litigation on behalf of the United States, but, instead, upon whether the Executive or Judicial Departments may disregard an exercise of the exclusive constitutional power of Congress to enact, and to prescribe the remedies for violations of, an all-inclusive statutory scheme for the protection of federal navigable waters.

Section 17 of the 1899 Act (33 U. S. C. 413, Pet. Br. 50-52), relied upon by Petitioner (Pet. Br. 42) in no way vests in the Attorney General authority to assert remedies which Congress did not see fit to create. That section merely provides the procedure for enforcement of the penalties provided in Sections 12 and 16. (See House Report No. 1569, 67th Congress, 4th Session, Pet. Br. App. C, 73; House Document No. 417, 69th Congress, 1st Session, *infra*, App. 75-7.)

The cases cited by Petitioner in support of its argument concerning the inherent right of the Attorney General (Pet. Br. 42) to seek the relief here involved are also inapposite. Thus *In Re Debs*, 158 U. S. 564, involved numerous federal statutes regulating and defining numerous duties of interstate carriers and declaring roads to be post roads, and government property rights in the mails while in transit. (l. c. 579-81, 583-4.) In *North Bloomfield Gravel Mining Co. v. United States*, 88 Fed. 664 (9th Cir.), the action was specifically authorized by Section 19 of the California Debris Commission Act to enforce a licensing system for hydraulic mining. (21 *Op. Atty. Gen.* 10-11). *United States v. Ingram*, 203 F. 2d 91 (8th Cir.) and *Griffin v. United States*, 168 F. 2d 457 (8th Cir.) were brought under federal statutes, and, in the *Griffin* case, under a right reserved by the Government in a lease. In *Economy Light & Power Co. v. United States*, 256 U. S. 113, the action was brought to enjoin continuation of the

construction of a dam in a navigable stream without state authorization or compliance with Section 9 of the 1899 Act (33 U. S. C. 401). *Converse v. Portsmouth Cotton Oil Refining Co.*, 281 Fed. 981 (4th Cir.) was a case between private litigants in which appellee claimed destruction of its common law riparian right to use the waters of a stream for manufacturing operations; and the only federal questions raised, which the court termed frivolous, were appellant's contention that performance of a Government contract gave it immunity from liability and that performance of the decree might require a federal permit which it might not be able to obtain (l. c. 984-6, 987). Clearly none of these cases support Petitioner's argument.

V. PETITIONER FAILS TO ESTABLISH ANY ADMINISTRATIVE CONSTRUCTION WHICH SUPPORTS ITS INTERPRETATION OF ANY RELEVANT SECTION OF THE 1899 ACT.

Petitioner relies upon excerpts from "certain administrative and congressional materials" which allegedly support Petitioner's present construction of the relevant sections of the 1899 Act. (Pet. Br. App. C, 64.) Plainly, the only administrative construction, if any, which is established by these excerpts, is that Section 13 is the only section of the 1899 Act which is applicable to the acts of Interlake.*

1. *Applicable Legal Principles*: Unless an alleged administrative construction meets the following standards,

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* Section 13 of the 1899 Act (33 U. S. C. 407) is the only section of the 1899 Act which is claimed to be applicable in any of the letters or documents cited by Petitioner to establish the administrative construction upon which it relies. (Pet. Br. App. C, 67, 70, 71, 73, 74, 84, 85, 89, 90, 92, 93, 94, 95, 96, 99.)

it is not established or, if technically established, will be given little or no weight. *First*, the statutory language must be ambiguous. *Louisville & Nashville Railroad Co. v. U. S.*, 282 U. S. 740, 756-59 (1931), *U. S. v. Missouri Pacific Railroad Co.*, 278 U. S. 269, 277 (1929). *Second*, the administrative construction must have been contemporaneous, long continued and uniformly applied throughout the geographic area to which the statute applies. *Burnet v. Chicago Portrait Co.*, 285 U. S. 1, 16 (1932); *Smiley v. Holm*, 285 U. S. 355, 369 (1932); *Wisconsin Central Railroad v. U. S.*, 164 U. S. 190, 205 (1896). *Third*, where, as here, a criminal statute is involved, an administrative construction cannot be used to circumvent or limit application of the settled rule that such statutes are strictly construed, either in a criminal prosecution, *U. S. v. Standard Brewery*, 251 U. S. 210, 220 (1920), or in a civil action brought under the statute. *F. C. C. v. American Broadcasting Co.*, 347 U. S. 284, 296 (1954). *Fourth*, an administrative construction (1) which has not been published, *Estate of Sanford v. Commissioner*, 308 U. S. 39, 53 (1939), *Biddle v. Commissioner*, 302 U. S. 573, 582 (1938), or (2) which has been made by a subordinate of the administrative officer or department head charged with its administration, will be given little, if any, weight. *E. C. Olsen Co. v. State Tax Commission*, 109 Utah 563; 168 P. 2d 324, 332 (1946): *Fifth*, an administrative construction, which does not involve an exercise of special administrative *expertise* can be given little, if any, weight. *I. C. C. v. Service Trucking Co.*, 186 F. 2d 400, 402 (3rd Cir. 1951.)

2. *Letters from the District Engineer to the Illinois Steel Company*: This "material" consists of unpublished letters from a District Engineer to the Illinois Steel Company which, so far as appears, merely reflects a personal view of a local subordinate officer. The first letter omitted

more than ten years after Congress passed the 1899 Act, merely "requested" the Company to install screens or a catch basin at the mouth of its sewer. (Pet. Br. App. C, 65.) The 1911 letter from Illinois Steel Company is an answer to a questionnaire designed to collect data for use in preparing a preliminary examination and survey with respect to the justification, if any, for navigation improvements in designated waterways, and merely states that an increase in project depths in the Calumet Harbor and at the mouth of the Calumet River so as to provide a 21 foot draft for its ore carriers would be in the Company's interest. (Pet. Br. App. C, 66, last paragraph.) Nothing in this correspondence shows that the Company did any dredging other than voluntarily in its own interests either to facilitate its own operations or to recover material whose value exceeded the cost of dredging. Thus, in H. Doc. 494, 72nd Congress, 2nd Sess., the District Engineer stated with respect to his *assumption* that the Company would dredge a particular shoal: "As the material is stated by the owners to be worth $2.00 per ton, *no difficulty is anticipated on this score.*" (Pet. Br. App. C, 82.)

3. *Letters from the District Engineer to Interlake*: The two blast furnaces, which Interlake now owns and operates, were placed in operation by another company in 1907 and 1909, respectively. In October of 1942 Interlake installed a Dorr thickener which removes 98% of all flue dust not already reclaimed by other processes, or, otherwise stated, all except a very small amount of very fine particles which flow in suspension or in permanent solution through sewers into the river or into a privately owned slip. The only alleged administrative construction by this subordinate officer was a claim that Section 13 of the 1899 Act applied to Interlake's sewer effluents. This alleged

after Congress passed the 1899 Act and 35 years after the first blast furnace at the plant now owned by Interlake went into operation, and it could not have been based upon any personal knowledge of the intent of Congress in 1899 or upon any administrative *expertise* of the engineer. It was not contemporaneous, long continued or notorious.

4. *Petitioner's "Congressional Materials"*: Petitioner quotes an excerpt from testimony given in 1954 by Col. Powers before a House Subcommittee (Pet. Br. App. C, 97). After stating that theretofore the Corps of Engineers had been attempting to persuade industrial concerns to cooperate in the removal of industrial waste, Col. Powers said: "We cannot force them to pay their proportionate share, but upon negotiations in a number of places they have paid their proportionate cost of removal."

Petitioner's erroneous use of reports by the Corps of Engineers reflects great confusion or misunderstanding. Engineering reports on preliminary surveys of navigable waters, which can not be made except pursuant to express congressional authorization, begin with a report by the District Engineer which is successively reviewed and generally revised by the Division Engineer, the Board of Engineers and the Chief of Engineers. If the report recommends any navigation improvement which Congress decides to authorize, authorization is based solely on the recommendation and estimate of the Chief of Engineers. *United States v. Arizona*, 295 U. S. 174, 189-90, fn. 9-13 inclusive. Nevertheless, Petitioner cites and quotes recommendations and estimates from reports of the District Engineer which reviewing officers discarded.

Paragraph 230 of H. Doc. 237, quoted by Petitioner at pages 34 and 67 of its brief, is from the report of the District Engineer. The report of the Board of Engineers (par. 25, p. 15, App. 74-5) and also paragraph 220 of [illegible]

of the District Engineer (App. 75), make clear that the recommendation that the Sanitary District (after completion of the Calumet Sag canal) be required to maintain the project depths was based upon the fact that the Sanitary District was excavating the entire channel of the Calumet River so as to reverse its natural flow and hydraulic grade under permits from the Secretary of War in which such an obligation lawfully could be imposed upon the Sanitary District as a condition of issuing the necessary permits.

Petitioner quotes from reports of House Committees which are part of the legislative history of the Federal Oil Pollution Act of 1924 and its subsequent amendment. Manifestly, these reports are not part of the legislative history, and do not constitute an administrative construction, of the Rivers and Harbors Act of 1899. Two of these reports show that in 1923 and in 1936 a Committee of the House recommended passage of a bill, each of which would have amended Section 13 of the 1899 Act in ways that would have narrowed the exception incorporated in that Act. (Pet. Br. App. C, 71, 84.) Since neither bill passed, such inferences, if any, as can be drawn from those events refutes the construction of Section 13 now urged by Petitioner in this Court.

The excerpt quoted by Petitioner from the 1926 Report on Pollution of Navigable Waters (Pet. Br. 35, 36) does state some significant facts. The first sentence states: "Except in isolated and unimportant instances the pollution of waters by domestic sewage and industrial wastes does not directly interfere with commerce or commercial navigation." The report then states that in the few instances where large quantities of sewage are discharged into restricted or sluggish waters which do not contain enough oxygen "to break up the solids," dredging becomes necessary which is generally "well attended to by *munici-*

pal authorities." Any fine solids carried in Interlake's sewer effluents are non-putrescible and could not create the unusual situation to which the report refers.

The Report of the Chief of Engineers dated June 4, 1926 which was incorporated in H. Doc. 417, 69th Cong., 1st Sess. (cited Pet. Br. 35), states: "Domestic sewage consists of organic and inorganic matter *in a solid state,* in *suspension* and in solution." (p. 2, App. 76.) Manifestly, the Chief of Engineers did not then agree with Petitioner's present position that there is no distinction between refuse matter "in a solid state" and refuse matter "in suspension." He also stated that the domestic sewage of practically all inhabited communities was then discharged into waters without treatment. (p. 2, App. 76.)

5. *Petitioner's Claim that Its Alleged Administrative Construction has been Ratified by Congress:* It would be sufficient to point out that Congress could not ratify an alleged administrative construction which, as hereinbefore shown, never existed. Nevertheless, Petitioner first seemingly asserts that a statement contained in a *1954* Report of a Subcommittee of the House Committee on Appropriations constitutes a congressional ratification of an administrative construction of the 1899 Act. If so, it is a ratification of an administrative construction that Section 13 is the only section of the 1899 Act applicable to Interlake's acts. (Pet. Br. 5-6, App. C 99.) However, to suggest that the incorporation of a statement in the report of a single House Committee which, so far as appears, has never been approved by the House or the Senate, constitutes a congressional ratification of an alleged administrative construction, is nonsense. Manifestly, the members of the Subcommittee in 1954 had no knowledge as to the intent of Congress in 1899. To give it any significance

would be to amend the 1899 Act without approval by the House, the Senate or the President.

The principal argument, upon which Petitioner attempts to support its claim of congressional ratification of a non-existent administrative construction, is that Congress authorized the existing project for the Calumet River upon the understanding that the Illinois Steel Company would remove a certain shoal adjacent to the outer bulkhead of its plant which consisted of "metallic dust and ore refuse" that had escaped from its plant. (Pet. Br. 26-7.) Apart from other defects, the argument is based upon a complete misconception or misstatement of the facts.

First: Petitioner alternatively attributes to the *Division Engineer* and even to the *Chief of Engineers* (Pet. Br. 26, App. C, '81) a cost estimate which the Division Engineer's Report quoted by Petitioner expressly states to be that of the *District Engineer*. (H. Doc. 494, p. 24, par. 9.)

Second: Even Petitioner's truncated quotation from the Division Engineer's Report (H. D. 494, p. 24, par. 9) shows on its face that the foregoing estimate of the District Engineer was for the cost of "dredging a harbor of refuge [in Lake Michigan] and entrance channel" and not for dredging the Calumet River. (Pet. Br. 26, App. C, 81.)

Third: The District Engineer explained in *his report* that he had "*assumed*" removal of the shoal by the Illinois Steel Company because: "As the material is stated by the owners to be worth $2.00 a ton, *no difficulty is anticipated on this score*." (H. Doc. 494, p. 34, par. 20.) Incidentally, the existence in *1932* of this shoal in the entrance channel, which rose above the surface of the water, is hardly consistent with Petitioner's assertion that, since May 22, 1909, the District Engineer had regularly required the Illinois

Steel Company to remove all shoals (Pet. Br. 26, App. C, 65).*

Fourth: Whereas the District Engineer had recommended a project at an estimated cost of $8,140,000 (H. Doc. 494, pp. 24-5, par. 9), his recommended project and its cost estimates were successively rejected by the Division Engineer, Board of Engineers and Chief of Engineers, who severally recommended a project at an estimated cost of $4,540,000 and made no reference to the removal of a shoal by Illinois Steel Company. (H. Doc. 494, page 28, par. 12; pp. 6-7, par. 6; pp. 3-4, par. 7.)

Fifth: The only condition incorporated in the recommendation of the Chief of Engineers and in the subsequent authorization of the project by the Congress was that riparian owners should donate the lands or easements necessary for widening and straightening the Calumet River and for excavating certain proposed turning basins. (H. Doc. 494, pp. 4, 7, 28-9; 49 Stat. 1028, 1036; Pet. Br. App. C, 83.)

Plainly, Congress could not have authorized the existing project on the understanding or upon the condition that even the Illinois Steel Company would remove the specified shoal, and, *a fortiori*, upon the understanding or condition that Interlake or the other Respondents would assume any obligation to maintain the navigation channel in the Calumet River. Even if, contrary to the fact, Con-

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* It should be noted that after 1933, when the Sanitary District reversed the natural flow and hydraulic grade of the Calumet River and diverted its natural flow plus additional water from Lake Michigan into the Mississippi watershed, the location of the very large integrated steel plant of Illinois Steel Company (a subsidiary of United States Steel Corporation) was no longer at the mouth, but instead at the source, of the Calumet River so that refuse matter from that plant would be transported, if at all, away from Lake Michigan and toward Respond-

gress had authorized the project on the understanding or express condition that riparian owners should assume an obligation to maintain the channel, that would no more have imposed any legal obligation upon riparian owners than did the condition in the actual authorization that the riparian owners donate the land necessary for execution of part of the project.

6. The administrative construction of Section 10, which was approved in *Wisconsin v. Illinois*, 278 U. S. 367, 413, was that, under the second and third clauses of Section 10, the Secretary of War had authority to issue permits for acts which obstructed navigable capacity. For a period of more than 30 years which began July 3, 1896, successive Secretaries of War had uniformly construed the second and third clauses of Section 10 of the 1899 Act, and a comparable provision in Section 10 of the 1890 Act, as authorizing them to issue permits for excavations and structures which would create an obstruction to navigable capacity. This administrative construction, sanctioned by this Court in the foregoing case, does not in any way support Petitioner's present contention that Section 10 of the 1899 Act applies to Interlake's acts or to the construction of Section 13 of the 1899 Act. However, it does completely refute Petitioner's present claim that clauses 2 and 3 of Section 10 of the 1899 Act, and even the provisions of every other section of the 1899 Act, are subordinate to, and controlled by, the first clause of Section 10 of the 1899 Act. (Pet. Br. 20, 28.) Moreover, the contemporaneous, uniform, long-continued and notorious administrative construction sustained in that case was directly and affirmatively established (*supra*, 48); whereas Petitioner seeks to conjure an alleged administrative construction by drawing strained and dubious inferences from ambiguous, conflicting and *ex post facto* "administrative and con-

gressional materials" which are either unrelated, or very indirectly and dubiously related, to the sections of the 1899 Act now before the Court.

CONCLUSION.

For all of the foregoing reasons, it is respectfully submitted that the Judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

RAYMOND T. JACKSON,
WARREN DAANE,
HENRY E. SEYFARTH,
Attorneys for Respondent,
Interlake Iron Corporation.

BAKER, HOSTETLER & PATTERSON,
SEYFARTH, SHAW, FAIRWEATHER,
& GERALDSON,
Of Counsel.

September 30, 1959.

APPENDIX.

EXCERPTS FROM HOUSE DOCUMENT NO. 293, 54TH CONGRESS, 2ND SESSION

Office of the Chief of Engineers, United States Army,
Washington, D. C., February 10, 1897.

SIR: Section 2 of the river and harbor act of June 3, 1896, directs the Secretary of War 'to cause to be prepared a compilation of all general laws that have been enacted from time to time by Congress for the maintenance, protection, and preservation of the navigable waters of the United States which are now in force, and to submit the same to Congress' at its present session, 'together with such recommendation as to revision, emendation, or enlargement of the said laws as, in his judgment, will be advantageous to the public interest.'

In pursuance of the foregoing provision of the act, I have the honor to submit herewith (1) a compilation of the general laws relating to the maintenance, preservation, and protection of navigable waters of the United States now in force, and (2) a draft of an act embodying such revision and enlargement of the aforesaid laws as the experience of this office has shown to be advantageous to the public interest.

The draft submitted *covers every subject embraced in the existing laws, together with some additional subjects,* except those authorizing the Secretary of War to make regulations for the navigation of Government canals and for the opening of drawbridges, which are comprehended in sections 4 and 5, respectively, of the act of August 17, 1894. These two laws have been omitted for the reasons that they appear unobjectionable in their present form; regulations under their provisions have been prescribed with much care and published at much expense; their force and constitutionality have been sustained by the courts, and no public advantage could be obtained by any change in their provisions.

Much care has been given by this office to the preparation of the draft submitted, and the views of some of the

most experienced officers of the Corps of Engineers have been invited and considered in connection therewith. It is believed to be clear and free from ambiguity, and better adapted to conserve the important interests of commerce and navigation than the laws in their present form.

As the Secretary of War has given personal consideration to the question of changing the existing law relating to the removal of wrecks, special care has been exercised in the revision of the law on that subject, which will be found in sections 11 and 12 of the draft submitted.

In this connection attention is respectfully invited to a separate paper containing a draft of a law for the removal of wrecks, which, it is understood, accords with the views of the Philadelphia Maritime Exchange. This, however, differs but little from the draft adopted by this office.

Very respectfully, your obedient servant,

JOHN M. WILSON,
Brig. Gen., Chief of Engineers, U. S. Army.

Hon. DANIEL S. LAMONT,
Secretary of War.

EXCERPTS FROM HOUSE DOCUMENT NO. 237, 63RD CONGRESS, 1ST SESSION

The report of the Board of Engineers for Rivers and Harbors on Survey, dated July 30, 1913 contains the following paragraph in connection with the Calumet River:

"25. After the completion of the Calumet Sag Channel, the present direction of the flow of water in the Calumet River will be reversed and its hydraulic grade will be changed with a consequent lowering of the water surface at the Forks of 0.256 foot, involving the excavation of about 41,300 cubic yards of material in addition to the amount required to complete the present project. The district officer recommends that the Sanitary District be required to remove this material, and in view of the large amount of sewage and waste deposited in the Calumet

River and its tributaries, he believes that *after the Sanitary District completes the Sag Channel it should be required to maintain at its own expense the projected depth of 21 feet in the Calumet River.* The board concurs in the views expressed by the district officer." (p. 15)

The report of the District Engineer in Chicago contains the following paragraphs:

"229. The Sanitary District of Chicago has been authorized by the Secretary of War to construct a canal connecting the Little Calumet River near Blue Island with the Main Sanitary District Canal at Sag, provided that the total water diversion from Lake Michigan is not increased thereby, and its construction has been begun. After its completion the present direction of the flow of water in the Calumet River will be reversed and its hydraulic grade will be changed, with a consequent lowering of the water surface at the Forks of 0.256 foot. In order to provide a depth of 21 feet in the Calumet River from its mouth to the forks after this event, it will be necessary to excavate about 41,300 cubic yards of material in addition to the amount required to complete the present project. It is recommended that the Sanitary District of Chicago be required to remove this material.

EXCERPTS FROM HOUSE DOCUMENT NO. 417, 69TH CONGRESS, 1ST SESSION

A report from the Chief of Engineers, dated June 4, 1926 (pp. 2-28) contains the following statements:

3. POLLUTING SUBSTANCES.

"Polluting substances which are being deposited directly or indirectly into the navigable waters of the United States or into non-navigable waters connected therewith, may be divided into two general classes: (A) Domestic sewage; (B) industrial wastes.

"(A) *Domestic sewage.*—Domestic sewage is discharged into streams, lakes, or other waters from nearly all

cities and inhabited communities situated on or near such waters. *In the great majority of cases it is discharged in a raw or untreated state directly into waters through outfall sewers.* Domestic sewage consists of organic and inorganic matter *in a solid state, in suspension, and in solution.* It also contains great numbers of bacteria, the majority of which are harmless but necessary in the natural processes of decomposition of the organic matter.

"(B) *Industrial wastes.*—Wastes resulting from industrial processes generally originate either as a by-product from a chemical or mechanical reaction or as an end product which is not commercially feasible or mechanically possible to recover. Spent chemical solutions used in the various industrial processes are also often wasted." (pp. 2-3.)

* * * * *

Section 7 of the report (pp. 19-20) is entitled "Existing Federal Laws Relating to the Pollution of Navigable Waters." The following appears on p. 19 in this section:

"The existing Federal laws which pertain to the pollution of navigable waters are as follows:

"(a) Section 13, 16, 17 of the river and harbor act of March 3, 1899.

"(b) An act to prevent obstructive and injurious deposits within the harbor and adjacent waters of New York City, etc., approved June 29, 1888, as amended by acts approved May 28, 1908, August 18, 1894, and February 16, 1909.

"(c) The oil pollution act, 1924.

"(a) The act of March 3, 1899, is a general law applicable to all navigable waters of the United States. Section 13 provides that it shall not be lawful to discharge or deposit from any vessel or shore establishment 'any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States,

or into any tributary of any navigable water from which the same shall float or be washed into such navigable water.' *Section 16 provides penalties of fine and imprisonment for violations of section 13, and section 17 fixes the procedure of enforcement. Substances flowing from streets and sewers in a liquid state are specifically excepted from the provisions of this law*, and in practice it has been found impracticable to control under this law any form of liquid pollution even though it comes from a source other than streets and sewers."

EXCERPTS FROM HOUSE REPORT NO. 1569, 67TH CONGRESS, 4TH SESSION

Petitioner's brief (App. C, pp. 72-4) quotes from a letter from John W. Weeks, Secretary of War, to Hon. S. Wallace Dempsey, dated June 9, 1922, but omits the last paragraph of the letter which reads as follows:

"H. R. 10956 provides a specific code for the prevention of oil pollution, with elaborate and possibly expensive methods of administration. As enforcement must rest with the courts, it is not clear that it would prove any more effective than the legislation I have hereinbefore recommended. However, as I believe legislation in some form is urgently necessary, I do not object to this particular bill if Congress prefers it. I agree with the committee that the penalty prescribed in the bill is extreme. *Experience has shown that in statutes of this kind moderate penalties aid in enforcement*, as courts are often reluctant to convict when the punishment necessarily to follow seems unreasonably severe. It is suggested that it would be advisable, in case the committee decides to favor this bill, to amend the penalty provisions in sections 5 and 6, as I have indicated therein."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 56

UNITED STATES OF AMERICA, *Petitioner,*

vs.

REPUBLIC STEEL CORPORATION, INTERNATIONAL HARVESTER COMPANY, AND INTERLAKE IRON CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR REPUBLIC STEEL CORPORATION.

PAUL R. CONAGHAN,
208 South La Salle Street,
Chicago 4, Illinois,

H. C. LUMB,
Republic Building,
Cleveland 1, Ohio,
Attorneys for Republic Steel Corporation.

STEVENSON, CONAGHAN, HACKBERT, ROOKS AND PITTS,
208 South La Salle Street,
Chicago 4, Illinois,
Of Counsel.

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IN THE

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OCTOBER TERM, 1959.

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REPUBLIC STEEL CORPORATION, INTERNATIONAL HARVESTER COMPANY, AND INTERLAKE IRON CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR REPUBLIC STEEL CORPORATION.

OPINIONS BELOW.

The memorandum of the trial court (R. 91-97) is reported in 155 F. Supp. 442. The opinion of the Court of Appeals (R. 2559) is reported in 264 F. 2d 289.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the brief for the United States.

STATUTES INVOLVED.

Sections 10, 12, 13 and 16 of the Rivers and Harbors Act of March 3, 1899, 33 U. S. C. A. 403, 406, 407 and 411.

QUESTIONS PRESENTED.

1. Whether Section 10 of the Rivers and Harbors Act of March 3, 1899 (33 U. S. C. A. 403) prohibits the discharge of water containing less than ½ of 1% of suspended solids from the sewers of Republic's plant into the navigable waters of the Calumet River?

2. Whether Section 13 of the Rivers and Harbors Act of March 3, 1899 (33 U. S. C. A. 407) prohibits the discharge of water containing less than ½ of 1% of suspended solids from the sewers of Republic's plant into the navigable waters of the Calumet River?

3. Whether Section 12 or Section 16 of the Rivers and Harbors Act of March 3, 1899 (33 U. S. C. A. 406 and 411) provides the remedy of injunction to petitioner if Sections 10 or 13 of the Rivers and Harbors Act of March 3, 1899 (33 U. S. C. A. Sections 403 or 407) are found to have been violated?

4. Whether in the event the remedy of injunction is not available to petitioner by any provision of the Rivers and Harbors Act of March 3, 1899, or independently thereof, the remedy of damages is available to petitioner on the record in this case?

PRELIMINARY.

Attorneys for the government have filed with the Clerk of this Court correspondence of the Chicago District Engineers and various companies in the Chicago area (Govt. Br., pp. 65-96). Copies were not served on Republic or on the two other respondents. These letters are not part of the record. *They never were offered in evidence.*

Nevertheless, some of this correspondence is referred to in the Argument (Govt. Br., pp. 25-28).

The filing with the Clerk of correspondence during a period of more than 50 years (from May 22, 1909) is not authorized by prior practice, by any rule of this Court or by law. The invitation (Govt. Br., p. 64) to search "so that the complete correspondence may be examined" by this Court and by attorneys for respondents is contrary to the concept of law.

The action of the government attorneys is similar to that which this Court struck down in *Panama Refining Company, et al.* v. *Ryan, et al.*, 293 U. S. 388 (January, 1935).

We have never heard of an attempt to establish "filing cabinet law." Some of the letters were addressed to companies which are not respondents.

We respectfully request that this Court disregard this dossier.

STATEMENT.

The complaint in this case was filed November 1, 1954. It alleged that the three respondents operate mills for the manufacturing of iron, steel and kindred products "along the banks and channel of the Calumet River, Rock Section, between Stations 112 and 200 (hereinafter referred to as the 'Calumet River') * * *." (R. 8)

The complaint also alleged that the three respondents violated Title 33 U. S. C. 403 and 407, prayed that the respondents be enjoined from depositing industrial solids or flue dust into the channel of the Calumet River and that a final decree be entered directing the respondents by dredging operations or otherwise *"to restore the bed of the Calumet River in front of, or abutting on, their mills or establishments to the original channel depth of twenty-one (21) feet."* (R. 9)

The trial began February 20, 1956 and ended April 11,

1956. (R. 1) During the trial and on April 2, 1956, after the respondents had commenced the presentation of evidence, attorneys for the government filed an amended complaint. (R. 71)

The amended complaint alleged also the violation of Title 33 U. S. Code Sections 403 and 407 and prayed for a final decree ordering respondents and each of them "*by dredging operations, or otherwise to restore the Federal Channel of the Calumet River between Stations approximately 105 and 300 to the original channel depth of twenty-one (21) feet.*" (R. 74)

The principal objective of the amended complaint was to enlarge the area of requested dredging from "in front of, or abutting on, their mills" (R. 9) to an area "between Stations approximately 105 and 300 to the original channel * * *" of the Calumet River (R. 74) or *a reach of approximately two-thirds of the channel of the Calumet River.* (The distance between each Station is 100 feet.)

Neither the complaint nor amended complaint prayed for *damages.*

The trial court took the matter under advisement on April 11, 1956. (R. 1) On June 19, 1957, the trial court filed its memorandum of law (R. 91-97) and findings of fact (R. 98-110) and on June 24, 1957 its decree. (R. 111-114) The trial court then recessed until September 9, 1957.

When the decree was entered on June 24, 1957 and before Republic filed its motion for amendment of the judgment under F. R. Civ. P. 52(b) and for a new trial under F. R. Civ. P. 59(a) the trial court stated, in answer to counsel's question whether "we would have oral argument on the findings" (R. 2258):

"No. I am through with this lawsuit. You can find

error in anything I did or anything I don't do. I am through with this lawsuit. I won't spend more time on it. I am through with this lawsuit."

Thereafter, Republic filed its combined motions under F. R. Civ. P. 52(b), 59(a) and 73. (R. 120-190) The two other respondents filed similar motions.

On the first day of court after the summer recess, September 9, 1957, at the opening of court, the trial judge announced his retirement from the bench forthwith. He did retire on September 14, 1957.

On September 9, 1957, Republic filed affidavits in support of its motion for a partial new trial in accordance with F. R. Civ. P. 59(a). (R. 256-264) The purpose of this motion and affidavits was to present to the trial court evidence developed during the summer recess with respect to continuous sampling every 3 minutes, 24 hours per day, of the effluents from each of Republic's sewers for a period of six weeks prior to September 9, 1957. (R. 2262-2265)

The trial judge overruled this motion on September 9, 1957, overruled all other post trial motions of Republic and all other post trial motions of the two other respondents. Thus the decree became final on September 9, 1957.

The decree in this case (R. 111-114) restrains the respondents from depositing in the federal channel of the Calumet River between Stations 105 and 300 "industrial solids, including flue dust without first obtaining a permit from the Chief of Engineers of the Department of the Army of the United States of America, providing for satisfactory conditions for the removal of such future deposits and discharges. * * *" (R. 111)

The decree further directs each respondent to remove by dredging from the channel of the Calumet River between Stations 105 and 300 certain percentages—as to Republic 36.78% of 81.5%—of "industrial solids or wastes,

including flue dust, found in the federal channel of the Calumet River aforesaid. * * *'' (R. 112)

The Calumet River, located within the city limits of Chicago, flows southward from Lake Michigan at the extension of 89th Street, with frequent sharp turns, to "The Forks" near 129th Street. There Lake Calumet (2½ miles long north and south and 1¾ miles wide) has an outlet into the Calumet River.

The channel along the south shore of this lake has been dredged by Chicago Regional Port District to a depth of 21 feet to the Calumet River. The south shore of Lake Calumet contains docks, warehouses and grain elevators for the loading and unloading of barges engaged in Mississippi River Basin traffic. These structures accommodate also general cargo to and from ports on the Great Lakes and to and from countries throughout the world utilizing the St. Lawrence Seaway.

From 129th Street the Calumet River flows south to 142nd Street. The Grand Calumet River converges with the Calumet River at 138th Street. There the Calumet River becomes the Little Calumet River. South of Lake Calumet (129th Street) the channel depth of the Calumet River drops from 21 feet to 11 feet. (Govt. Ex. 2; R. 338)

From 142nd Street the Little Calumet River turns westward and continues until it joins another branch of the Little Calumet River and the Calumet-Sag Canal, since 1930 a federal waterway. (Rivers and Harbors Act of July 3, 1930, c. 847, 46 Stat. 929; Republic Ex. 5, R. 873, 1377, 1535) This canal was excavated in 1922 to a depth of 20 feet. Silting has reduced the depth to 9 feet. (Republic Ex. 5; Tr. 1267, R. 873; R. 1377)

Immediately west of this junction are the locks at Blue Island, Illinois, 13.6 miles from the mouth of the Calumet River. There are locks also at the western end of the

16 mile Calumet-Sag Canal at Lockport, Illinois. The Calumet-Sag Canal presently is being widened from 60 feet to 225 feet with federal and State of Illinois funds. Completion is scheduled for 1962. The waters of this canal flow into the DesPlaines River near Lockport, thence to the Illinois and Mississippi Rivers. (See maps, Appendix *infra*)

The operation of the locks at Blue Island and Lockport is conducted by employees of the Metropolitan Sanitary District of Greater Chicago, as supervised and directed by the U. S. Corps of Engineers in accordance with a decree of this Court entered April 21, 1930 in the Sanitary District diversion case, *Wisconsin* v. *Illinois*, 281 U. S. 696.

This decree in part provides:

> "3. That on and after December 31, 1938, unless good cause be shown to the contrary, the defendants, the State of Illinois and the Sanitary District of Chicago, their employees and agents, and all persons assuming to act under the authority of either of them, be and they hereby are enjoined from diverting any of the waters of the Great Lakes—St. Lawrence system or watershed through the Chicago Drainage Canal and its *auxiliary channels or otherwise* in excess of the annual average of 1,500 cubic feet per second *in addition to domestic pumpage.*
>
> "4. That the provisions of this decree as to the diverting of the waters of the Great Lakes—St. Lawrence system or watershed relate to the flow diverted by the defendants *exclusive of the water drawn by the City of Chicago for domestic water supply purposes and entering the Chicago River and its branches or the Calumet River or the Chicago Drainage Canal as sewage.* The amount so diverted is to be determined by deducting from the total flow at Lockport the amount of water pumped by the City of Chicago into its water mains and as so computed *will include the run-off of the Chicago and Calumet drainage area.*" (Emphasis ours.)

The gates at Blue Island are kept open at all times—from "one foot, two feet, three feet, up to wide open"—except during times of heavy floods. (R. 1518) During heavy floods they are closed. (R. 1519) During heavy floods branches of the Little Calumet River in Indiana and Illinois and the Grand Calumet River then flow into Lake Michigan by way of the Calumet River. ("Floods of October 1954 in the Chicago Area, Illinois and Indiana" by Warren S. Daniels and Malcolm D. Hale, published by United States Department of Interior, Geological Survey, Washington, D. C., 1955)

The locks at Blue Island are opened as many as 20 or 25 times per day during a 24 hour period for intervals of from 10 to 20 minutes in order to permit barges to enter and leave the Calumet-Sag Channel. (R. 1518) The opening of these locks increases the velocity of the Calumet River from Blue Island to its mouth at Lake Michigan. (R. 1520) The flow is not measured at Blue Island. It is measured only at Lockport in order to limit the flow in the Sanitary District Canal and the Calumet River to 1500 cubic feet per second of water diverted from Lake Michigan, in addition to domestic pumpage, as provided in the decree of this Court in *Wisconsin* v. *Illinois*, *supra*.

The Calumet River watershed is a low glacial plain occupying an area of approximately 800 square miles in 1931. (H. Doc. 494, 72nd Cong., 2d Sess., Cong. Doc. Ser. No. 9681, p. 8)

In 1954, the tributaries of the Little Calumet River alone, flowing into the Calumet-Sag Canal or into Lake Michigan by way of the Calumet River during times of heavy rains, had a drainage area of 287 square miles. (U. S. Dept. of Int. Geological Survey "Floods of October 1954 in the Chicago Area—Illinois and Indiana", published Washington, D. C., 1955, pp. 10-12)

Lake Michigan at 89th Street in Chicago is relatively shallow. U. S. Lake Survey prepared by the Corps of Engineers (Govt. Ex. 2; R. 338) shows depths varying from 3 to 25 feet south of the harbor channel leading to the Calumet River. Lake Michigan near South Chicago first reaches a depth of 300 feet 30 miles from shore. At Milwaukee the same depth is reached 10 miles from shore. ("Geology of the Great Lakes," Hough, University of Illinois Press, 1958, p. 9.) The deepest section of Lake Michigan is near the center of the lake east of Green Bay, Wisconsin. There the depth is 923 feet or 343 feet below sea level. (*Ibid*, p. 7)

The surface currents of Lake Michigan opposite the mouth of the Calumet River are from north to south. These currents turn east along the shore of Lake Michigan in Indiana ("Geology of the Great Lakes," p. 38). These currents bring suspended solids into the mouth of the Calumet River.

One mile north of the entrance to the Calumet River near 79th Street and the shore of Lake Michigan, the Chicago South Side Filtration Plant is located. Water is pumped into this filtration plant by a large conduit from the Dunne Crib located 2 miles offshore. This filtration plant supplies filtered water to approximately 1½ million persons in Chicago south of 39th Street and in 24 suburbs of Chicago in Illinois.

The removal of these suspended solids from the waters of Lake Michigan has been described (Robert Hainey, Chicago Sunday Tribune, March 22, 1959, Part 1, page 14) as follows:

> "Aluminum sulfate and ferrous sulfate are used to coagulate the suspended matter in the water, such as particles of mud, microscopical organisms, and bacteria. The bulk of the impurities and suspended matter settles out in huge basins. Lime is used to lessen the

corrosiveness of the water to pipes, and sodium silicate is used at times during the winter to aid coagulation and settling.

"After the chemicals are added, the water gets a violent massage, then goes to another area where it gets a gentler cocktail shaker treatment.

"In the settling basins, the water gets a chance to rest, while the chemicals go to work knocking out sediment, which collects on the bottom of the tanks and is removed by a system of scrapers, similar to the ones used by a snack shop cook to scrape the grease from his grill.

"The sediment is flushed back into the lake. If it were dehydrated into a solid chunk, a day's collection would weigh about 28,000 pounds, Baylis said."

Removal from Lake Michigan near the mouth of the Calumet River of 14 tons of suspended solids each 24 hour period amounts to 5,110 tons of dry solids per year or 25,555 tons in a five year period. *Thus the water of Lake Michigan is dirty water before it enters the Calumet River.*

There are 37 sewer outfalls other than those of the three respondents which empty into the Calumet River. (R. 365-70) No sample for suspended solids from any one of these 37 sewer outfalls has ever been taken by the Corps of Engineers. (R. 429, 590, 1199)

The City of Chicago (R. 484-92), the Metropolitan Sanitary District of Greater Chicago (R. 474-84) and Commonwealth Edison Company (R. 455-74, 2037-38) have sewer outfalls north or upstream from Republic's plant. The sewers of the City of Chicago and the Sanitary District contain sanitary sewage (in times of heavy rains) in addition to "street run-off." The sewer outfall from the slag settling pit of Commonwealth Edison Company which discharges into the Calumet River is 25′ × 12′. (R. 458) This plant consumes about 2400 tons of coal per day. (R. 377) It discharges into the Calumet River from 490,000 to 495,000

gallons of water per minute under full plant operation. (R. 463) The suspended solids in this sewer outfall are estimated to be 197,000 tons (dry weight) during a 5 year period, excluding credit for suspended solids pumped into the plant from the Calumet River. (R. 2037-8)

The quantity of water leaving all of the sewers of Republic and entering the Calumet River amounts to 60,267 gallons per minute. (Republic Ex. 32; Tr. 2380, 2406; R. 1384-1400)

Between Station 105 and Station 300, the reach of the Calumet River which the three respondents are required to dredge, there are sewer outfalls of Great Lakes Carbon Company, estimated to contain 525 tons of suspended solids (dry weight) during a five year period (R. 2039); Globe Asphalt Company, estimated to contain 19,650 tons of suspended solids (dry weight) during a five year period (R. 2039-40); General Chemical Company, estimated to contain 1,825 tons of suspended solids (dry weight) during a five year period (R. 2040-41); Wolf Lake Ditch (R. 2044-45); Ford Motor Company, with two sewer outfalls, one showing concentration of suspended solids of 45.9 parts per million, the other 25.7 parts per million (R. 2046) and Allied Chemical Company, estimated to contain 1,250 tons of suspended solids (dry weight) during a five year period. (R. 2046-47)

There has been no dredging in the Calumet River from Station 227 to Station 300 since 1945. (Govt. Ex. 8; R. 877)

No. 1 sewer outfall of Republic is 36″ × 54″; No. 2, 36″ in diameter; No. 3, 60″ in diameter; No. 4, 42″ in diameter; No. 5, 48″ in diameter; No. 6, 12″ in diameter (surface water only); No. 7, 72″ in diameter. (Republic's Exhibit 32; R. 1388-91; 1384)

Republic's No. 7 sewer outfall is the only sewer outfall which serves the coke plant and the blast furnace. It is the only sewer outfall of Republic which contains fine

particles of flue dust, some of which cannot be seen even by the use of a microscope. (R. 1300)

The sole basis for the trial court's 81.5% responsibility of the three respondents is two exhibits introduced in evidence by petitioner—Govt. Ex. 171 and Govt. Ex. 172; Tr. 1412, 1511; 1412, 1539. The first exhibit (Govt. Ex. 171) relates to 22 samples taken from the bottom of the Calumet River in 1955 between Stations 20 to 300 (approximately five miles). Two of these samples were taken from the privately owned slips of two of the respondents and *not from the channel of the Calumet River.* Petitioner then made a microscopic count of particles in a plus 325 mesh in these samples. (R. 963-1025)

The second exhibit (Govt. Ex. 172) is a chemical analysis for iron oxide of minus 325 mesh solids from 11 Calumet River bottom samples taken in December, 1955, between Stations 105 and 300 in the Calumet River. From these two exhibits an expert witness for the government testified the responsibility of the three respondents "may be calculated * * * as being about 70%" (R. 1288) of the shoaling in the channel of the Calumet River from Station 105 to 300. The same expert made an "engineering calculation" (R. 1291) and arrived at 93%. (R. 1293)

The trial court split the difference for the decree and made it 81.5%.

Measurements of the suspended solids in the sewer outfalls of all of the respondents were conducted during February and March, 1955, under the supervision of an independent engineering consultant specializing in the measuring of such suspended solids. Methods approved and jointly published by American Public Health Association and American Water Works Association (Ninth Ed., 1951) and titled "Standard Methods for the Examination of Water and Sewage" were followed. (Republic Ex. 60; R. 2337-42)

As to Republic, composite samples of four individual samples at two hour intervals during an eight hour sampling period were taken on each sewer outfall during eight hour shifts from February 6, 1955 to February 27, 1955, inclusive. (Republic Ex, 124; R. 2391) Three eight hour shifts were included. Republic then was operating more than 100% of theoretical capacity.

The summary of another measurement of suspended solids in Republic's sewers is shown by Republic Ex. 154; R. 2433. That exhibit and the testimony of the expert represents a net total of 8,389 tons of settleable solids entering the channel of the Calumet River during the years 1952 to 1955, inclusive, or an average net of 2,097 tons per year.

Presumably from these measurements of suspended solids in the sewer outfalls of respondents, the trial court for the decree obtained responsibilities of 36.78% of 81.5% for Republic, 36.31% of 81.5% for Harvester and 26.91% of 81.5% for Interlake. (R. 112, 113) The memorandum, decree or findings of fact of the trial court give no indication whatsoever as to how these percentages were computed.

But the trial court did not accept the net discharge of the three respondents as shown by the measurements of the consulting engineer. In lieu thereof, the trial court accepted the estimated 81.5% of all solids in the Calumet River from Stations 105 to 300 from the 22 bottom samples plus 11 bottom samples as hereinbefore described.

The Court of Appeals reversed the decree of the trial court with directions to the trial court to dismiss the complaint because the Court of Appeals found (1) that 33 U. S. C. A. Sections 403 and 407 had not been violated and (2) that "there is no legal basis, statutory or otherwise, upon which the government is entitled to injunctive relief." (R. 2580)

SUMMARY OF ARGUMENT

I. Attorneys for petitioner seriously contend that small particles of flue dust, many of which "are too small to be seen under a microscope" (R. 1300) and other suspended solids in Republic's seven sewer outfalls which empty into the navigable waters of the Calumet River constitute an "obstruction" within the meaning of the 1899 statutes, 33 U. S. C. A. 403. If they do not constitute an obstruction, attorneys for the petitioner argue that the suspended solids constitute a "fill" within the meaning of Section 403.

Republic admits plenary power in Congress to regulate its sewer effluents. Congress has not exercised this power in the 1899 statutes. There is no common law of the United States which prohibits obstructions and nuisances in navigable waters. Therefore, there must be a direct statute of the United States to "bring within the scope of its laws, as administered by the courts of law and equity, obstructions and nuisances in navigable streams within the states." *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1.

Congress has given its consent and approval to the Ohio River Valley Water Sanitation Compact of 1939 and the New York Harbor (Tri-State) Interstate Sanitation Compact of 1935 to provide for the removal of not less than forty-five per cent (45%) of total suspended solids in the former compact and at least ten per cent (10%) of suspended solids in the latter. Congress has also given its consent and approval to the Potomac River Basin Compact of 1935 and the New England Interstate Water Pollution Control Compact of 1947. Each of these two compacts provide for a commission to fix reasonable minimum stand-

ards for the treatment of sewage and industrial and other wastes.

Republic does not contend that these compacts restrict the power of Congress to regulate navigation. This Court has already decided that compacts do not restrict the power of Congress. Otherwise Congress and two states would possess the power to modify and alter the Constitution itself.

Republic does contend, however, that Congress, by giving its consent and approval to these compacts, indicated an expressed intention that the 1899 statutes did not regulate suspended solids in sewer outfalls and that the various compacts did not interfere with any policy previously announced by Congress.

Specific delegation of authority by Congress to executive agencies is required by many decisions of this Court before this Court will adjudicate. There has been no specific delegation of authority by Congress in the 1899 statutes to regulate suspended solids in Republic's sewers.

II. The first clause of 33 U. S. C. A. 403 provides "the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; * * *." Republic contends that this general language does not apply to the suspended solids in Republic's sewers. It refers to specific structures—"bridge, dam, dyke, or causeway" for the construction of which the consent of Congress is required by 33 U. S. C. A. 401. Specific language should control the construction of the 1899 statutes. General language or general terms in the 1899 statutes should not control when specific language or specific terms apply.

This Court has construed the meaning of the words "affirmatively authorized by Congress" in *Wisconsin* v. *Illinois*, 278 U. S. 367, 412 (1929). While attorneys for

petitioner cite this case on eight pages of the brief and argument for the United States, the language of this Court construing "affirmatively authorized by Congress" is not quoted in petitioner's brief.

Republic further contends that water containing less than ½ of 1% of suspended solids in its sewers does not constitute "the creation of any obstruction" within the meaning of the first clause of Section 403. Neither do the suspended solids constitute a "fill" within the meaning of the third clause of Section 403.

III. If Section 403 was violated, there is no remedy of injunction in this case. The history of Section 403 indicates that in the 1890 Act there were statutory provisions permitting the removal of unlawful obstructions by injunction. However, this clause was repealed when Section 403 was passed by Congress in 1899. *United States* v. *Wilson*, 235 F. 2d 251, 2d Cir. (1956).

The remedy of injunction is provided in 33 U. S. C. A. 406. However, the remedy of injunction is limited to the removal of "structures." Republic's sewers containing less than ½ of 1% of suspended solids do not constitute "structures" within the meaning of Section 406. This Court should not legislate into Section 406 the remedy of injunction because Congress has expressly limited and deliberately restricted the remedy of injunction to the removal of "structures."

IV. The removal of structures by injunction as provided in Section 406 is the *exclusive* remedy. When Congress creates a new right or offense and provides a specific remedy or punishment, they alone apply. Such provisions are *exclusive*.

V. Republic has not violated 33 U. S. C. A. 407. That section prohibits the discharge from any manufacturing establishment of "any refuse matter of any kind or de-

scription whatever other than that flowing from streets and sewers and passing therefrom in a liquid state." This exception specifically permits Republic to have its sewers empty into the Calumet River.

Republic diverts no waters from the Calumet River. All waters pumped from the Calumet River by Republic are returned to that river. No sanitary sewage from Republic's plant enters the Calumet River. Therefore, the various dicta in the opinion of this Court in *Sanitary District* v. *United States*, 266 U. S. 405 (1925) do not apply.

The percentage of water in the sewer effluents of Republic is in excess of 99.9% (R. 2101). State regulatory agencies and interstate compact agencies consider solids in sewer outfalls similar to Republic to be in a liquid state (R. 2101). Therefore, the exception clause in Section 407 clearly applies to Republic's sewers.

VI. Even if Republic has violated Section 407, there is no remedy of injunction available to the United States. A specific remedy for violations of Section 407 is provided in 33 U. S. C. A. 411. That remedy is fine or imprisonment. It is the *exclusive* remedy. No remedy by injunction is provided.

VII. The United States is not entitled to damages representing the cost of dredging. There was no prayer for damages in the complaint or amended complaint. It is made in this Court for the first time. Petitioner is not entitled to recovery on a cause of action different from that on which the complaint is based. *Rosenfield* v. *Lion Manufacturing Corp.*, 253 F. 2d 90 (1958).

ARGUMENT.

I.

REPUBLIC ADMITS PLENARY POWER IN CONGRESS TO REGULATE WITHIN CONSTITUTIONAL LIMITS SEWER EFFLUENTS OF REPUBLIC INTO THE NAVIGABLE WATERS OF THE CALUMET RIVER. CONGRESS HAS NOT EXERCISED ITS PLENARY POWER IN THE 1899 STATUTES TO REGULATE SUCH EFFLUENTS.

Section VIII of the Constitution in part provides:

> "The Congress shall have power: * * *
>
> (3) To regulate commerce with foreign nations and among the several states; * * *"

This clause has been interpreted to mean that Congress has the power to regulate within constitutional limits the navigable waters of the United States. In the early case of *Gibbons* v. *Ogden*, 9 Wheat. 1, 193 (February, 1824) this Court stated:

> "The word used in the Constitution, then, comprehends, and has been always understood to comprehend, navigation, within its meaning; and a power to regulate navigation is as expressly granted as if the term had been added to the word 'commerce'."

This Court further found that the power of Congress is complete in itself and may be exercised to the utmost extent, and acknowledges no limitation other than are prescribed in the Constitution.

This Court further stated, *ibid*, 197:

> "If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States is vested

> in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States."

The extent to which the power of Congress over navigation is plenary is shown by the case of *State of Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 18 Howard 421 (1856). The decree of this Court found that the bridge over the Ohio River was an obstruction to navigation and a nuisance. Before the decree was executed, Congress declared the bridge a lawful structure and not an obstruction. This Court refused to issue a mandate enforcing its own decree, stating, p. 430:

> "So far, therefore, as this bridge created an obstruction to the free navigation of the river, in view of the previous acts of congress, they are to be regarded as modified by this subsequent legislation; and, although it still may be an obstruction in fact, is not so in the contemplation of law."

The history of plenary power in Congress with respect to navigable waters has been reviewed and the law clearly stated by this Court in *United States* v. *Appalachian Power Company*, 311 U. S. 377 (1940) wherein this Court stated p. 404:

> "The power of the United States over its waters which are capable of use as interstate highways arises from the commerce clause of the Constitution. 'The Congress shall have Power * * * to regulate Commerce * * * among the several States.' It was held early in our history that the power to regulate commerce necessarily included power over navigation. To make its control effective the Congress may keep the 'navigable waters of the United States' open and free and provide by sanctions against any interference with the country's water assets. It may legislate to forbid or license dams in the waters; its power over improvements for navigation in rivers is 'absolute'.

> "The states possess control of the waters within their borders, 'subject to the acknowledged jurisdiction of the United States under the Constitution in regard to commerce and the navigation of the waters of rivers.' It is this subordinate local control that, even as to navigable rivers, creates between the respective governments a contrariety of interests relating to the regulation and protection of waters through licenses, the operation of structures and the acquisition of projects at the end of the license term. But there is no doubt that the United States possesses the power to control the erection of structures in navigable waters."

In the *Appalachian Power Company* case 41 states attacked the power of Congress to impose conditions unrelated to navigation in granting authority for hydro-electric power development. Notwithstanding this formidable opposition, this Court ruled that the power of Congress was plenary, even though the statute passed by Congress benefited hydro-electric development.

There is in this case no question of the power of Congress to regulate the sewer effluents of Republic into the navigable waters of the Calumet River. Republic contends, however, that Congress has not exercised its plenary power in the 1899 statutes to regulate such effluents.

In Point II of this brief we will discuss Section 10 of the 1899 Act, 33 U. S. C. A. 403, and the reasons why this section does not apply to suspended solids in Republic's sewer effluents.

Congress has specifically excepted such effluents from regulation in Section 13 of the 1899 Act, 33 U. S. C. A. 407. That section, which we will discuss in Point V of this brief, makes it unlawful to discharge or deposit into any navigable water of the United States "any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state * * *." The suspended solids in Republic's sewer

effluents constitute "refuse" "flowing" from Republic's "streets and sewers and passing therefrom in a liquid state."

Although Section 407 has been in force more than 65 years, no case has been found construing Section 407 to prohibit the discharge of street run-offs into navigable waters or to prohibit the discharge of industrial waste (less than ½ of 1%) carried in suspension in sewers flowing into navigable waters.

A. Common Law Principles Do Not Apply.

Approximately one year before the passage of the 1899 statutes, this Court decided *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1. This Court stated, p. 8:

> "The power of Congress to pass laws for the regulation of the navigation of public rivers, and to prevent any and all obstructions therein, is not questioned. But until it does pass some such law, there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers * * *. There must be a *direct statute of the United States* in order to bring within the scope of its laws, as administered by the courts of law and equity, *obstructions* and nuisances in navigable streams within the States. Such obstructions and nuisances are offences against the laws of the States within which the navigable waters lie, and may be indicted or prohibited as such; but they are not offences against United States laws which do not exist; and none such exist except what are to be found on the statute book. * * * The failure of state functionaries to prosecute for breaches of the state law, does not confer power upon United States functionaries to prosecute under a United States law, *when there is no such law in existence.*" (Emphasis ours.)

This language was quoted with approval by this Court in *United States v. Bellingham Bay Boom Company*, 176 U. S. 211, 217 (1900).

B. Specific Delegation of Authority by Congress to Regulate the Contents of Sewers Discharging Into Navigable Waters Is Demanded by the Constitution and by Decisions of This Court.

1. Such Specific Delegation of Authority by Congress to Regulate the Contents of Sewer Outfalls Into Navigable Waters Has Been Made by Consent and Approval of Interstate Compacts.

a. Ohio River Valley Water Sanitation Compact of 1939 with respect to interstate navigable waters in the States of Illinois, Indiana, Kentucky, New York, Ohio, Tennessee and West Virginia and the Commonwealth of Pennsylvania provides for "the removal of not less than forty-five per cent (45%) of the total suspended solids."

By Joint Resolution of June 8, 1936 (49 Stat. 1490) Congress gave its consent to the negotiation by all of the States hereinbefore mentioned of "agreements or compacts for conserving and regulating the flow, lessening flood damage, removing sources of pollution of the waters thereof, or making other public improvements on any rivers or streams whose drainage basins lie within any two or more of the said States."

The Joint Resolution also provided that no compact or agreement so entered into should be "binding or obligatory upon any State or party thereto unless and until it has been approved by the legislatures of each of the States whose assent is contemplated by the terms of the compact or agreement and by Congress." The legislatures of all of the states in the compact ratified.

The "consent and approval" of Congress was given to the Ohio River Valley Water Sanitation Compact by the Act of July 11, 1940, 54 Stat. 752. Section 4 of the Act provided that nothing contained in it or in the compact "shall be construed as impairing or affecting the sovereignty of the United States or any of its rights or juris-

diction in and over the area of waters which are the subject of such compact."

Legislative history is set forth in S. 3617 and H. R. 9775, 76th Congress; S. 1711 (Committee on Commerce) and H. R. 2653 (Committee on Rivers and Harbors) 76th Congress; 86 Cong. Rec. 7102-04, 9128-29, 9209 (1940); P. L. 739, 76th Congress.

> See *West Virginia, ex rel., Dyer* v. *Sims*, 341 U. S. 22, 24 (1951).

If Congress thought it had prohibited *all suspended solids* in sewer outfalls of industry by the 1899 statutes it would not have given its "consent and approval" in 1940 (54 Stat. 752) to the Ohio River Sanitation Compact for "the removal of not less than forty-five per cent (45%) of total suspended solids" in interstate rivers governed by the compact.

The Ohio River Sanitation Compact providing for "the removal of not less than forty-five per cent (45%) of total suspended solids" clearly indicates as a matter of construction that Congress thought that the 1899 statutes did not regulate suspended solids in sewer effluents of municipalities or industries or that Congress had specifically excepted such effluents from regulation in Section 13 of the 1899 Act (33 U. S. C. A. 407).

Do attorneys for petitioner contend that as to the Calumet River, wholly within the State of Illinois, all suspended solids must be removed from sewers, but as to the Ohio River, forming part of the southeast boundary of the State of Illinois, only "not less than forty-five per cent (45%) of the total suspended solids" must be removed?

b. The New York Harbor (Tri-State) Interstate Sanitation Compact of 1935 with respect to interstate navigable waters in the States of New York, New Jersey and Connecticut provides for the removal "of at least 10 per centum of the suspended solids."

Consent to this compact by Congress was given by Joint Resolution of August 27, 1935 (49 Stat. 932). For legislative history, see S. J. Res. 159 and H. J. Res. 349, 74th Congress; S. R. 1228 (Committee on Judiciary) and H. R. 1724 (Committee on Judiciary), 74th Congress; 79 Cong. Rec. 13054-55, 14147-49 (1935); Pub. Res. 62, 74th Congress. This compact was ratified by the signatory states. See also, "Documents on the Use and Control of the Waters of Interstate and International Streams," U. S. Department of Interior, 1956, p. 105.

As to non-recreational waters or waters not for the development of fish life, the compact required the removal of "at least 10 per centum of the suspended solids, or such additional percentage as may by reason of local conditions be necessary to avoid the formation of sludge deposits * * *" in such waters.[1]

1. Articles VI and VII of the compact provide:

"1. It is recognized by the signatory States that, where tidal waters are used for such varied purposes as bathing, navigation, shellfish culture, the development of fish life, and the disposal of wastes, no single standard of purity is practicable in all parts of the district. In order to attain the objects of this compact, the commission, after proper study and after conducting public hearings upon due notice, shall group the designated waters of the district into classes. Where local conditions shall have changed in the future to such an extent that changes in classification become necessary, the commission may, after conducting public hearings upon due notice, adopt such changes.

"Two general classifications shall be used:

"(1) Class A, in which the designated water areas are expected to be used primarily for recreational purposes, shellfish culture, or the development of fish life;

"(2) Class B, in which the designated water areas are not expected to be used primarily for recreational purposes, shellfish culture, or the development of fish life.

Thus Congress, in consenting and approving compacts requiring removal of "at least 60 per centum of the suspended solids" for one class of waters and the removal of "at least 10 per centum of the suspended solids" for another class of waters, did not consider that all suspended solids in sewers flowing into navigable waters were prohibited by

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"Article VII.

"1. It is agreed between the signatory States that no sewage or other polluting matters shall be discharged or permitted to flow into, or be placed in, or permitted to fall or move into the tidal waters of the district, except under the following conditions and restrictions:

"(1) All sewage discharged or permitted to flow into class A waters of the district shall first have been so treated as—

"(a) to remove all floating solids and at least 60 per centum of the suspended solids; and

"(b) to effect a reduction of organisms of the B. coli group (intestinal bacilli) so that the probable number of such organisms shall not exceed one per cubic centimeter in more than 50 per centum of the samples of sewage effluent tested by the partially confirmed test: *Provided, however,* That in the case of discharge into waters used primarily for bathing, this bacterial standard need not be required except during the bathing season; and

"(c) to effect a reduction in the oxygen demand of the sewage effluent sufficient to maintain an average dissolved-oxygen content in the tidal waters of the district and in the general vicinity of the point of discharge of the sewage into those waters, at a depth of about five feet below the surface, of not less than 50 per centum saturation during any week of the year.

"(2) All sewage discharged or permitted to flow into class B waters of the district shall first have been so treated as—

"(a) to remove all floating solids and at least 10 per centum of the suspended solids, or such additional percentage as may by reason of local conditions be necessary to avoid the formation of sludge deposits in the class B waters of the district; and

"(b) to effect a reduction in the oxygen demand of the sewage effluent sufficient to maintain an average dissolved-oxygen content in the tidal waters of the district and in the general vicinity of the point of discharge of the sewage into those waters, at a depth of about five feet below the surface, of not less than 30 per centum saturation during any week of the year."

the 1899 statutes, as clearly inferred by the decree entered by the trial court in this case.

c. The Potomac River Basin Compact of 1939 with respect to interstate navigable waters in the States of Maryland and West Virginia, the Commonwealths of Pennsylvania and Virginia and the District of Columbia provides for a Commission to fix "reasonable, minimum standards for the treatment of sewage and industrial or other wastes."

Consent and approval was given by Congress by the Joint Resolution of August 31, 1937 (50 Stat. 884) and the Joint Resolution of July 11, 1940 (54 Stat. 748). See also, "Documents on the Use and Control of the Waters of Interstate and International Streams," U. S. Department of Interior, 1956, p. 132. For legislative history, see S. J. Res. 222 and H. J. Res. 524, 76th Congress; S. R. 1715 (Committee on Commerce) and H. R. 2654 (Committee on Rivers and Harbors), 76th Congress; 86 Cong. Rec. 7101-2, 9137-38 (1940); Pub. Res. 93, 76th Congress.

This compact, ratified by the signatory states, provided for a Commission to co-ordinate, tabulate and summarize data on the pollution of streams in the district to secure new data by investigations, analyses or other means on the character and conditions of streams and to make "reasonable, minimum standards for the treatment of sewage and industrial or other wastes now discharged or to be discharged in the future to the stream of the Conservancy District * * *." See, "Documents on the Use and Control of the Waters of Interstate and International Streams," U. S. Department of Interior, 1956, p. 131.

If Congress had thought the 1899 statutes made a specific, full and complete regulation of "industrial or other wastes" discharged from sewers into navigable waters, surely it would not have given its consent in 1937 and in 1940 to the Potomac River Compact.

d. New England Interstate Water Pollution Control Compact of 1947 with respect to interstate navigable waters in the states of Connecticut, Maine, New Hampshire, Rhode Island, Vermont and the Commonwealth of Massachusetts provides for a Commission to control industrial wastes.

Consent and approval by Congress to negotiations for this compact was given by Joint Resolution of June 8, 1936 (49 Stat. 1490). Consent and approval of Congress to this compact was given by the Act of July 31, 1947 (61 Stat. 682). For legislative history, see S. 1418 and H. R. 3875, 80th Congress; S. R. 680 (Committee on Public Works) and H. R. 1062 (Committee on Public Works) 80th Congress; 93 Cong. Rec. 9838-40, 10216-18 (1947); P. L. 292, 80th Congress. See also, "Documents on the Use and Control of the Waters of Interstate and International Streams," U. S. Department of Interior, 1956, p. 96.

Article V of that compact provides:

"It is recognized, owing to such variable factors as location, size, character and flow and the many varied uses of the waters subject to the terms of this compact, that no single standard of sewage and *waste treatment* and no single standard of quality of receiving waters is practical and that the degree of treatment of sewage and *industrial wastes* should take into account the classification of the receiving waters according to *present and proposed highest use*, such as for drinking water supply, *industrial and agricultural uses*, bathing and other recreational purposes, maintenance and propagation of fish life, shellfish culture, navigation and *disposal of wastes*.

"The commission shall establish reasonable *physical, chemical and bacteriological standards of water quality satisfactory for various classifications of use.*" It is agreed that each of the signatory states through appropriate agencies will prepare a classification of its interstate waters in entirety or by portions according to present and proposed highest use and for this purpose technical experts employed by state depart-

ments of health and state water pollution control agencies are authorized to confer on questions relating to classification of interstate waters affecting two or more states. Each signatory state agrees to submit its classification of its interstate waters to the commission for approval. It is agreed that after such approval all signatory states through their appropriate state health departments and water pollution control agencies will work to establish programs of treatment of sewage and *industrial wastes* which will meet standards established by the commission for classified waters. The commission may from time to time make such changes in definitions of classifications and in standards as may be required by *changed conditions or as may be necessary for uniformity.*" (Emphasis ours.)

In approving and consenting to this compact (as required by Section X, 3 of the Constitution) word for word in the Act of July 31, 1947 (61 Stat. 682), certainly Congress did not think that the 1899 statutes provided for the exclusion of all suspended solids in street run-offs and industrial wastes in sewer effluents. The reasonable conclusion to make is that Congress was of the opinion that the 1899 statutes did not apply or that the street run-off and sewer exception in 33 U. S. C. A. 407 did apply.

Republic does not contend that the various compacts referred to in this brief operate as a restriction upon the power of Congress to regulate suspended solids in Republic's sewers which empty into the navigable waters of the Calumet River. That question was answered by this Court in 1856, *State of Pennsylvania v. The Wheeling and Belmont Bridge Co.*, 18 Howard 421, 433, wherein this Court stated:

"The question here is, whether or not the compact can operate as a restriction upon the power of congress, under the constitution to regulate commerce among the several States? Clearly not. Otherwise congress and two States would possess the power to modify and alter the constitution itself."

Republic does contend, however, that in this case there is a lack of any specific legislation passed by Congress regulating suspended solids in Republic's sewer outfalls. The consent of Congress given to the various compacts referred to in this brief indicates an expressed intention on the part of Congress that no Congressional enactment regulated suspended solids in sewer outfalls and the consequences thereof and that any compact regulating suspended solids in sewer outfalls in the various States did not interfere with any policy previously announced by Congress by statute.

The consent of Congress given to the various compacts referred to in this brief indicates also that if any section of the 1899 Act applied to suspended solids in sewer outfalls it is 33 U. S. C. A. 407 prohibiting the discharge of "any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state. * * *"

2. Specific Delegation of Authority by Congress Is Required by Decisions of This Court Before This Court Will Adjudicate.

In the recent case of *Greene, Petitioner* v. *Neal M. McElroy, et al.*, 27 L. W. 4528 (1959), this Court considered the validity of the government's revocation of a security clearance granted to petitioner, an aeronautical engineer employed by a private manufacturer which produced goods for the Armed Services. The majority of the Court held that in the absence of "explicit authorization" from either the President or Congress, the respondents were not empowered to deprive the petitioner of his job. When neither the President nor Congress authorized procedures whereby petitioner's security clearance was revoked, the judiciary should not approve such procedures. Enactment of standards for such procedures in the first instance should be made either by the President or by Congress.

In *United States* v. *Standard Oil Company of California, et al.*, 332 U. S. 301 (1947), a soldier in the Army of the United States was injured by a motor truck resulting from negligence of the driver. The United States paid for his hospitalization and continued his Army pay during disability. The United States then brought suit in the Federal District Court of California against the owner and driver of the truck as tort-feasors to recover the amounts expended for hospitalization and pay, as for loss of the soldier's services. This Court, p. 315, stated:

> "When Congress has thought it necessary to take steps to prevent interference with federal funds, property or relations, it has taken positive action to that end. We think it would have done so here, if that had been in its desire. This it still may do, if or when it so wishes.
>
> "In view of these considerations, exercise of judicial power to establish the new liability not only would be intruding within a field properly within Congress' control and as to a matter concerning which it has seen fit to take no action. To accept the challenge, making the liability effective in this case, also would involve a possible element of surprise, in view of the settled contrary practice, which action by Congress would avoid, not only here but in the many other cases we are told may be governed by the decision.
>
> "Finally, if the common-law precedents relied on were more pertinent than they are to the total problem, particularly in view of its federal and especially its fiscal aspects, in none of the situations to which they apply was the question of liability or no liability within the power of one of the parties to the litigation to determine. In them the courts stood as arbiters between citizens, neither of whom could determine the outcome or the policy properly to be followed. Here the United States is the party plaintiff to the suit. And the United States has power at any time to create the liability. The only question is which organ of the Government is to make the determination that liabil-

> ity exists. That decision, for the reasons we have stated, is in this instance for the Congress, not for the courts. Until it acts to establish the liability, this Court and others should withhold creative touch."

What attorneys for petitioner are trying to do in this case is to bring about a "refashioning" of the 1899 statutes and make them applicable to suspended solids in sewer effluents emptying into navigable waters. As observed by this Court in *Federal Trade Commission* v. *Mandel Brothers, Inc.*, 79 S. Ct., 818, 823 (1959):

> "If we held that Congress, in spite of its desire to protect consumers, withheld from them the benefits of reliable invoices, we would have to read the clauses of § 3 distributively, making only some of them applicable to retail sales. That would be a refashioning of § 3, an undertaking more consonant with the task of a congressional committee than with judicial construction."

In *U. S.* v. *Twin City Power Co., et al.*, 350 U. S. 222 (1956), reh. denied 350 U. S. 1009 (1956), the United States brought suit for condemnation of private land adjoining a navigable river as part of a project for the improvement of the Savannah River Basin. Congress approved this project as part of "the comprehensive development of the Savannah River Basin for flood control and other purposes." In commenting on the finality of the decision of Congress with respect to navigation the Court, p. 224, stated:

> "It is not for courts, however, to substitute their judgments for congressional decisions on what is or is not necessary for the improvement or protection of navigation. See *Arizona* v. *California*, 283 U. S. 423, 455-457. The role of the judiciary in reviewing the legislative judgment is a narrow one in any case. See *Berman* v. *Parker*, 348 U. S. 26, 32; *United States, ex rel., TVA* v. *Welch*, 327 U. S. 546, 552. The decision of Congress that this project will serve the interests of navigation involves engineering and policy considerations for Congress and Congress alone to evaluate."

In *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508 (1941), this Court considered the Dennison Dam and Reservoir project on the Red River in Oklahoma and Texas authorized by the Act of Congress of June 28, 1938. Oklahoma complained that the proposed diversion of water would benefit Texas but seriously injure Oklahoma by obliterating state boundary lines, displacing population, interfering with oil and gas exploration, reducing tax revenues and appropriating state owned land. This Court, p. 527, stated:

> "Such matters raise not constitutional issues but questions of policy. They relate to the wisdom, need, and effectiveness of a particular project. They are therefore questions for the Congress, not the courts. For us to inquire whether this reservoir will effect a substantial reduction in the lower Mississippi floods would be to exercise a legislative judgment based on a complexity of engineering data. It is for Congress alone to decide whether a particular project, by itself or as part of a more comprehensive scheme, will have such a beneficial effect on the arteries of interstate commerce as to warrant it. That determination is legislative in character."

Courts should not legislate for Congress when Congress has omitted to act. Congress has omitted to act in the 1899 statutes in that it failed to specifically delegate authority to the Secretary of the Army to prohibit suspended solids in sewer effluents emptying into navigable waters, except that in 33 U. S. C. A. 407 Congress did specifically except refuse matter of any kind or description "flowing from streets and sewers and passing therefrom in a liquid state."

II.

SECTION 10 OF THE RIVERS AND HARBORS ACT OF 1899 (33 U. S. C. A. 403) DOES NOT APPLY TO REPUBLIC'S OPERATIONS.

A. Congress Has Adopted General Language and Specific Language in the 1899 Statutes and Specific Remedies for Specific Violations. The Specific Language Should Control the Construction of the 1899 Statutes.

B. Water Containing Less Than ½ of 1% of Suspended Solids from the Sewers of Republic's Plant, Some of Which Are Settleable Solids and Some of Which Are Non-Settleable Solids, Does Not Constitute or Result in "the Creation of Any Obstruction" Within the Meaning of the First Clause of Section 10 (33 U. S. C. A. 403).

Attorneys for petitioner argue (Govt. Br. pp. 14-28) that Republic has violated Section 10 of the 1899 statutes prohibiting obstructions to "navigable capacity." The first clause of Section 10 in the 1899 statutes, 33 U. S. C. A. 403, provides:

> "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; * * *"

This clause has been construed by this Court in *Wisconsin* v. *Illinois*, 278 U. S. 367, 412 (1929), as follows:

> "The words 'affirmatively authorized by Congress' should be construed in the light of the administrative exigencies which prompted the delegation of authority in the succeeding clauses. Congress, having stated in Section 9 as to what particular structures its specific consent should be required, intended to leave to the Secretary of War, acting on the recommendation of the

Chief of Engineers, the determination of what should be approved and authorized in the classes of cases described in the second and third clauses of Section 10. If the section were construed to require a special authorization by Congress whenever in any aspect it might be considered that there was an obstruction to navigable capacity, none of the undertakings specifically provided for in the second and third clauses of Section 10 could safely be undertaken without a special authorization of Congress. We do not think this was intended. The Supreme Court of Maine in *Maine Water Co.* v. *Knickerbocker Steam Towage Co.*, 99 Me. 473, took the same general view in construction of the same section. It held that the broad words of the first clause of that section were not intended to limit the second and third clauses and that Congress's purpose was a direct prohibition of what was forbidden by them except when affirmatively approved by the Chief of Engineers and the Secretary of War. We concur in this view."

The fallacy in the reasoning of attorneys for the government is that the second and third clauses of Section 403 are not equal in force or authority to "affirmatively authorized by Congress" in the first clause of Section 403. The second and third clauses of Section 403 constitute a delegation of authority by Congress to the Secretary of the Army, when plans have been recommended by the Chief of Engineers. "Affirmatively authorized by Congress" means a special bill or special reference in a bill passed by Congress approving the "creation of any obstruction * * * to the navigable capacity of any of the waters of the United States." No special bill or special reference in a bill passed by Congress is necessary for the second and third clauses of Section 403 to operate.

Attorneys for the government seek to change the construction of the first clause of Section 403 which has been

in effect for the past 30 years by the argument (Govt. Br. p. 16):

> "This Court agreed in *Wisconsin* v. *Illinois*, 278 U. S. 367, that actions permitted by the War Department under the second and third clauses of Section 10 were 'affirmatively authorized by Congress' within the meaning of the basic prohibition. * * *".

This argument, however, ignores the settled construction by this Court of the first clause of Section 403, as hereinbefore quoted.

Attorneys for the government quote from this case (Govt. Br. pp. 16-17) but *omit the first 17 lines in the above quotation.* No reference is made at any place in the brief for petitioner to the words "affirmatively authorized by Congress" as construed by this Court in *Wisconsin* v. *Illinois*, 278 U. S. 367, 412.

When this Court in *Wisconsin* v. *Illinois* referred to Section 9 of the 1899 statutes, it stated that Congress in Section 9 authorized "as to what particular structures its specific consent should be required" and then left to the Secretary of War, acting on the recommendation of the Chief of Engineers, the determination of what should be approved and authorized by them in the specific cases described in the second and third clauses of Section 10.

Section 9, 33 U. S. C. A. 401, of the 1899 statutes, provides that certain structures must have not only the consent of Congress but also that the plans be submitted to and approved by the Chief of Engineers and the Secretary of the Army. Section 9 of the 1899 statutes, 33 U. S. C. A. 401, reads as follows:

> "It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building

of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army: *Provided*, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of the Army before construction is commenced: *And provided further*, That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of the Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of the Army. Mar. 3, 1899, c. 425, § 9, 30 Stat. 1151."

This Court stated in *U. S.* v. *Appalachian Power Co.*, 311 U. S. 377, 398 (1940), as an introduction to the construction of the Federal Power Act:

> "Sections 9 and 10 of the Rivers and Harbors Act of 1899 make it unlawful to construct a dam in any navigable water of the United States without the consent of Congress."

Obviously, this Court in the *Appalachian* case referred to the first clause of Section 10, Section 403. That is the only clause in Section 10 which requires the "obstruction," such as a dam, to be "affirmatively authorized by Congress." Thus, the first clause in Section 401 relates to the same type of obstruction as the first clause of Section 403, *i.e.*, a bridge, causeway, dam or dyke. As to this type of construction, the affirmative authorization by Congress is required, in addition to plans approved by the Chief of Engineers and the Secretary of the Army, except as to

such structures "wholly within the limits of a single State."

The first clause of Section 403 is general. The first clause of Section 401 refers to "specific consent." It refers also to specific structures, *i.e.*, "any bridge, dam, dyke or causeway over or in any * * * navigable river * * *." The two clauses should be construed *in pari materia*. The specific language should control the construction. *United States* v. *Chase*, 135 U. S. 255, 260 (1890); *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208 (1932); *Fourco Glass Co.* v. *Transmirra Corp.*, 353 U. S. 222, 228-9.

In the *Fourco Glass Co.* case this Court, p. 228, stated:

> "In these circumstances the law is settled that 'However inclusive may be the general language of a statute, it "will not be held to apply to a matter specifically dealt with in another part of the same enactment. * * * Specific terms prevail over the general in the same or another statute which otherwise might be controlling." *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208.' *MacEvoy Co.* v. *United States*, 322 U. S. 102, 107."

As stated in the quoted language from *Wisconsin* v. *Illinois, supra*,

> "If the section were construed to require a special authorization by Congress *whenever in any aspect it might be considered that there was an obstruction to navigable capacity*, none of the undertakings specifically provided in the second and third clauses of Section 10 could safely be undertaken without a special authorization of Congress. *We do not think this was intended.*" (Emphasis ours.)

III.

IF SECTION 10 OF THE RIVERS AND HARBORS ACT OF 1899 (33 U. S. C. A. 403) WAS VIOLATED, THERE IS NO REMEDY OF INJUNCTION IN THIS CASE.

A. The History of Sections 10 and 12 (33 U. S. C. A. 403 and 406) Clearly Restricts the Injunctive Power to "Structures" and Thereby Excludes from Injunctive Scope the "Obstructions" Denounced by Section 10.

Section 10 of the Rivers and Harbors Act of September 19, 1890 (26 Stat. 426, 494) (Govt. Br. p. 46) (33 U. S. C. A. Section 403, Historical Note) in part provided that "the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited."

Section 10 of the 1890 Act provided also that every person and corporation which shall be guilty of creating or continuing such unlawful obstruction shall be guilty of a misdemeanor and on conviction thereof shall be punished by a fine not exceeding $5,000 or by imprisonment not exceeding one year or both.

Section 10 of the 1890 Act further provided:

> "the creating or continuing of any unlawful *obstruction* in this act mentioned may be prevented and such *obstruction* may be caused to be removed by the injunction of any circuit court [district court] exercising jurisdiction in any district in which such *obstruction* may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney-General of the United States." (Emphasis ours.)

Thus, in Section 10 of the 1890 Act there was the specific remedy of injunction provided to remove *obstructions* threatened or which may exist.

B. Section 10 of the 1890 Act, Expressly and Specifically Providing the Remedy of Injunction for the Removal of Obstructions, Was Repealed by Section 20 of the 1899 Act. Thus the Intention of Congress Is Clearly Expressed That the Remedy of Injunction Provided in Section 12 of the 1899 Act Is Expressly Limited and Deliberately Restricted to the Removal of Structures.

Section 10 of the 1890 Act was repealed by Section 20 of the Rivers and Harbors Act of 1899 (Govt. Br. p. 53; 33 U. S. C. A. Section 415, Historical Note). The repealing clause of Section 20 of the Rivers and Harbors Act of March 3, 1899, provided:

> "That all laws or parts of laws inconsistent with the foregoing sections ten to twenty, inclusive, of this Act are hereby repealed: *Provided*, That no action begun, or right of action accrued, prior to the passage of this Act shall be affected by this repeal."

In construing the operation of this repealing clause on Section 10 of the 1890 Act the Court of Appeals, in *United States* v. *Wilson*, 235 F. 2d 251, 2d Cir., August 3, 1956, pp. 252-3, stated:

> "We hold that § 10 of the Rivers and Harbors Act of 1890 was repealed by the Act of 1899. Section 20 of the later Act, in its final paragraph, 30 Stat. 1155, provided: 'That all laws or parts of laws inconsistent with the foregoing sections ten to twenty, inclusive, of this Act are hereby repealed * * *.' See Historical Note under 33 U. S. C. A. § 415. Sections 10, 12, 15 and 19 of the Act of 1899 *were* inconsistent with § 10 of the 1890 Act.
>
> * * * * * *
>
> "Section 12, 33 U. S. C. A. § 406, deliberately we think, restricts its injunctive power to 'structures' and thereby excluded from its injunctive scope the 'obstructions' denounced by § 10, 33 U. S. C. A. § 403. This construction, which we think required by the plain lan-

guage of the Act and its context, is corroborated by the strong intimations of §§ 15 and 19, 33 U. S. C. A. §§ 409 and 414. Since the injunctive powers conferred by § 12 are limited to the removal of structures violating §§ 9, 10 and 11, clearly they do not extend to violations of §§ 15 and 19."

Section 12 of the Rivers and Harbors Act of March 3, 1899 (33 U. S. C. A. 406), provides a specific remedy for violation of "any of the provisions of Sections 9, 10 and 11 of this Act * * *." This refers to 33 U. S. C. A. Sections 401, 403 and 404 and to no other provisions of the 1899 Act.

Attorneys for petitioner cite *United States* v. *Wishkaw Boom Co.*, 136 F. 42, 9th Cir. (1905), appeal dismissed 202 U. S. 613, as authority for the proposition that Section 10 of the 1890 Act is not inconsistent with Section 10 of the 1899 Act. (Govt. Br. pp. 23-24.) This question was considered by the Court of Appeals in *United States* v. *Wilson*, 235 F. 2d 251, 2d Cir. (1956), and was held untenable.

The Court in the *Wilson* case (in which no petition for rehearing was filed and no petition for certiorari was filed), stated, p. 252:

> "It is true that this holding is in conflict with *United States* v. *Wishkaw Boom Co.*, 9 Cir., 1905, 136 F. 42, appeal dismissed 202 U. S. 613, 26 S. Ct. 765, 50 L. Ed. 1171, upon which the Government relies. It was there said that § 10 of the 1890 Act, which prohibits both the creation and the continuance of an obstruction, is not inconsistent *with § 10 of the later Act*, which prohibits the creation of obstructions but not their continuance, and that therefore § 10 of the earlier Act does not fall within the scope of the repeal clause carried in § 20 of the later Act. We cannot agree with that holding. (Footnote 4.) With deference, we think that the court overlooked the fact that the repeal clause covered prior laws which were inconsistent not merely with § 10 of the later Act but,

rather, inconsistent with §§ 10 to 20, inclusive, of the later Act. As we have noted, if §§ 10, 12, 15 and 19 of the later Act be read together as they should be, they are inconsistent with § 10 of the earlier Act. By way of editorial comment to 33 U. S. C. A. § 403 it was stated that § 10 of the earlier Act 'was probably omitted from the Code [as indeed it was] as superseded by' § 10 of the 1899 Act. We hold that it was indeed repealed by § 20 of the 1899 Act.

"Thus the problem is resolved to this: Is the Government entitled to an injunction under the later Act?

"4. In the *Wishkaw Boom* case, the obstruction complained of was a log boom rather than a sunken vessel. And the court advanced as an alternative and unimpeachable ground for its decision the fact that the cause of action accrued prior to the enactment of the Act of 1899 and hence was not affected by the repeal provisions of § 20 of the 1899 Act which expressly saved rights of action previously accrued."

Section 406 makes the violation of any one of these three provisions of the 1899 Act a misdemeanor and on conviction thereof provides punishment not exceeding $2500 nor less than $500 or imprisonment not exceeding one year or both. Containing penal provisions, Section 406 should be strictly construed.

Section 406 then provides:

"And further, the removal of any *structures or parts of structures* erected in violation of the provisions of said sections [401, 403 and 404] may be enforced by the injunction of any district court exercising jurisdiction in any district in which such *structures* may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States." (Emphasis ours.)

Therefore, the remedy of injunction expressly provided for in Section 406 for the violation of Section 403 is limited to the removal of "structures". Clearly the injunc-

tive remedy of 406 cannot be extended to relate to the removal of "obstructions".

The Court of Appeals approved such construction in *United States* v. *Wilson, supra,* stating p. 253:

> "As to this, the only section of the later Act which contains injunctive provisions possibly applicable here is § 12, 33 U. S. C. A. § 406. The injunctive power so provided is expressly limited to 'the removal of any structures or parts of structures erected in violation of the provisions of' §§ 9, 10 and 11 of the 1899 Act. 33 U. S. C. A. §§ 401, 403 and 404. Clearly, our sunken barge is not a structure prohibited by §§ 9 and 11 which were concerned with bridges, dams, piers, wharves, etc. Nor, we hold, was it a 'structure' as denounced in § 10, 33 U. S. C. A. § 403. *In re Eastern Transportation Co.*, D. C., 102 F. Supp. 913. That section prohibits, first, 'The creation of any [unauthorized] obstruction * * * to the navigable capacity' of United States waters, and, second, the building of 'any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other *structures*' in any port, etc. (Emphasis supplied.) It thus makes a plain distinction between 'obstructions' and 'structures'."

In *In re Eastern Transportation Co.*, 102 F. Supp. 913 (U. S. D. C. Md., March 11, 1952), cited with approval in the *Wilson* case, the Court in construing Section 403, p. 915, stated:

> "[1] It is the contention of counsel for the trustee in bankruptcy that Section 403 and its penalty Section 406 by their language, apply only to wrongful 'structures' and are therefore not applicable to vessels such as these barges; in other words that the intent of Section 403 was the prohibition of structures of a more or less permanent nature unless authorized by law. The trustee relies in support of this position upon *United States* v. *Burns*, C. C., 54 F. 351, in which an earlier statute similar to and which was superseded by Section 403, was so construed. We are inclined to agree with the trustee on this point * * *."

In *United States* v. *Burns*, 54 F. 351 (Cir. Ct., D. West Virginia, 1893), a criminal prosecution was filed for obstruction of navigable waters of the United States under Sections 6, 7 and 10 of the Rivers and Harbors Act of 1890. The indictment alleged that the defendants deposited certain rubbish in the navigable waters thereby violating Section 10 of the Act. The Court, p. 363, stated:

> "I think that the obstructions contemplated by the tenth section—those that have not been affirmatively authorized by law, and are therefore prohibited—are such obstructions as are permanent in their nature, as are created for special purposes, by the usual modes of construction."

Judge Hutcheson in *United States* v. *Brazoria County Drainage District No. 3*, 2 F. 2d 861 (D. Ct. S. D. Texas, 1925), construed Sections 10 and 12 of the 1899 Act (33 U. S. C. A. 403 and 406) in a suit filed by the United States asking abatement as a public nuisance of a fill made in the Chocolate Bayou, a navigable stream, as the result of erosion and deposit caused by a drainage ditch negligently and improperly constructed by Drainage District No. 3. The Court, p. 862, stated:

> "That these statutes prohibit the erection of structures in navigable streams, unless the plans therefor have been approved by the War Department, and authorize the removal of such structures placed without such approval, is plain. That they do not apply to washing or erosion caused by drainage, and that the prohibitory features of the statutes cannot be distorted so as to cover the operations of drainage districts, is equally plain. If this is the correct construction of the statutes, it follows that there was no duty upon the Brazoria county drainage district to present its drainage plans to the War Department before they put them into operation, and that, such duty being absent, the government cannot enjoin the operation of the district for failure to make such submission.

> "The injunction prayed for will therefore be denied, at the cost of the United States."

Attorneys for petitioner in their summary of argument (Govt. Br. p. 10) stated:

> "But Congress prohibited *all* obstructions, not merely *some* of them. The authority given to The Department of the Army to *permit* certain activities in navigable waters is not a limitation on the general prohibition."

The first sentence in this quotation begs the question. Furthermore, the general language in the first clause of Section 403 is modified by the specific language in the first clause of Section 401 confining "the creation of any obstruction not affirmatively authorized by Congress" in the first clause of Section 403 to the construction of "any bridge, dam, dyke or causeway" in the first clause of Section 401.

The second sentence in the language quoted from the summary of argument on page 10 ignores the construction of Section 403 by this Court in *Wisconsin* v. *Illinois*, 278 U. S. 367, 412, hereinbefore quoted.

Finally, the argument ignores the well settled law that general language of the statute will not be held to apply to a matter specifically dealt with in another part of the same enactment. Specific terms prevail over the general. *United States* v. *Chase*, 135 U. S. 255, 260 (1890); *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208 (1932); *Fourco Glass Co.* v. *Transmirra Corp.*, 353 U. S. 222, 228-9.

C. This Court Should Not Legislate Into Section 406 What Congress Has "Expressly Limited" and "Deliberately" Restricted.

Congress has dealt specifically and differently with various classes of offenses which it included in the 1899 Act. This separate and complete substantive and remedial legislation prohibits the substitution of one section for another section of the Act.

This Court stated in *Iselin* v. *United States*, 270 U. S. 245, 250 (1926):

> "Congress undertook to accomplish its purpose by dealing specifically, and in some respects differently, with different classes of tickets and with tickets of any one class under different situations. The particularization and detail with which the scope of each provision, the amount of the tax thereby imposed, and the incidence of the tax, were specified, preclude an extension of any provision by implication to any other subject. The statute was evidently drawn with care. Its language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function."

See also cases quoted in this argument, Point I, B, 2: *Greene, Petitioner* v. *Neal M. McElroy, et al.*, 22 L. W. 4528 (1959); *United States* v. *Standard Oil Company of California, et al.*, 332 U. S. 301 (1947); *Federal Trade Commission* v. *Mandel Brothers, Inc.*, 79 S. Ct. 818, 823 (1959); *United States* v. *Twin City Power Co., et al.*, 350 U. S. 222, 224 (1956); *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 527 (1941).

D. Suspended Solids from Republic's Sewers, Whether Settleable or Non-Settleable, Do Not Constitute Either an "Obstruction" or a "Structure" Within the Meaning of Section 10 of the 1899 Act.

If Congress intended to include suspended solids within the meaning of "obstruction" or "structures" in Section 10 of the Act of 1899, it could easily have done so by clear and unambiguous language. Congress did not do so. The ordinary and plain meaning of "obstruction" and "structures" as used in Section 10 of the 1899 Act should prevail. Clearly these words do not apply to water containing less than ½ of 1% of suspended solids from the sewers of Republic's plant.

The most frequently quoted case by attorneys for petitioner is *Sanitary District* v. *United States*, 266 U. S. 405 (1925). This case is quoted at pages 9, 10, 12, 14, 17, 18, 19, 22, 23, 31, 39 and 41 of the brief for the United States. The opinion in this case contains various generalizations. "Generalizations are always dangerous."

The *Sanitary District* case relates to waters diverted from Lake Michigan to the Mississippi Basin for sanitary purposes.

As otherwise stated by this Court in the *Appalachian* case, 311 U. S. 377 (1940), p. 425:

> "*Wisconsin* v. *Illinois* is a part of the Chicago Drainage Canal litigation. In so far as pertinent here, it merely decided that under a certain federal statute there was no authority for diversion of the waters of Lake Michigan for sanitary purposes (p. 418). There is no consideration of the constitutional power to use water for other than navigable purposes, though it is plain that other advantages occur (pp. 415, 419)."

Republic diverts no waters from Lake Michigan or the Calumet River. All waters pumped from the Calumet River

by Republic are returned to the Calumet River. In addition, a large portion of 50,000 gallons of filtered water purchased monthly from the City of Chicago, used for cooling purposes where small pipes are involved, is discharged into the Calumet River (R. 1398). No sanitary sewage from Republic's plant, employing 4,400 persons, enters the Calumet River (R. 1398). Therefore, the various dicta in the opinion of this Court in the *Sanitary District* case are not applicable to the issues in this case.

E. Suspended Solids Do Not Constitute a Fill Within the Meaning of the Third Clause of Section 10.

Suspended solids discharged into the Calumet River from Republic's sewers do not constitute a "fill" within the meaning of the third clause of Section 403. That clause also contains the phrase "unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same." The third clause of Section 403 clearly relates to works of construction and not to suspended solids in sewer outfalls.

In *United States* v. *Brazoria County Drainage District No. 3* (D. C., S. D. Texas, 1925), 2 F. 2d 861, Judge Hutcheson held that Section 403 *did not apply to a fill* and that the statute "cannot be distorted so as to cover the operations of drainage districts * * *."

IV.

THE REMOVAL OF STRUCTURES IN NAVIGABLE WATERS BY INJUNCTION AS RESTRICTED IN SECTION 12 OF THE 1899 ACT (33 U. S. C. A. 406) IS THE EXCLUSIVE REMEDY.

A. Congress Created a New Right by Section 10 of the 1899 Act and, in Addition to Providing in Section 12 for Fine and Imprisonment for Its Violation, Created a Special and Specific Remedy of Injunction to Remove "Structures." These Remedies Alone Apply. Courts Should Not Create Additional Remedies. Only Congress Has the Constitutional Power to Do So.

The remedies provided by Section 12 of the 1899 Act are *exclusive*. The law of exclusive remedy has been stated in many decisions of this Court. We shall refer to some of them.

In *Barnet* v. *National Bank*, 98 U. S. 555 (1878), wherein this Court was construing the National Banking Act of June 3, 1864, this Court noted that when a person has paid interest declared unlawful by that Act, he may in an action of debt against the bank recover twice the amount so paid but that he can resort to no other mode or form of procedure. The Court, p. 558, stated:

> "Where a statute creates a new right or offense, and provides a specific remedy or punishment, they alone apply. Such provisions are exclusive. *Farmers' & Mechanics' Nat. Bank* v. *Dearing*, 91 U. S. 29."

In *Oates* v. *National Bank*, 100 U. S. 239 (1879), this Court again construed the National Banking Act and, p. 250, stated:

> "It denounces no penalty other than a forfeiture of the interest which the note or bill carries, giving to the debtor the right to sue for and recover twice the amount of interest so paid. If we should

declare the contract of indorsement void, and, consequently, that no right of action passed to the bank on the note transferred as collateral security, an additional penalty would thus be added beyond those imposed by the law itself. 'On what principle could this court add another to the penalties declared by the law itself?' *DeWolf* v. *Johnson*, 10 Wheat. 367; *Farmers' & Mechanics' National Bank* v. *Dearing*, 91 U. S. 29; *Barnet* v. *National Bank*, 98 id. 555."

In *Arnson* v. *Murphy*, 109 U. S. 238 (1883), this Court considered the question whether the common law right of action against a collector for custom duties to recover back dues illegally collected is taken away by statute and whether the remedy given based on statutory liability is exclusive. The Court, p. 243, stated:

"From this review of the legislation and judicial history of the subject, it is apparent that the common-law action recognized as appropriate by the decision in *Elliott* v. *Swartwout*, 10 Peters 137, has been converted into an action based entirely on a different principle—that of a statutory liability, instead of an implied promise—which, if not originated by the act of Congress, yet is regulated, as to all its incidents, by express statutory provisions. And among them are the conditions which fix the time when the suit may begin, and prescribe the period at the end of which the right to sue shall cease. Congress having undertaken to regulate the whole subject, its legislation is necessarily exclusive. For any inconveniences that may result to outgoing collectors or the representatives of those who have deceased, by the unavoidable delays in deciding appeals in the Treasury Department, and the absence of a definite period of time beyond which no suit shall be brought, it is for Congress alone to apply the needful remedy."

In *Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165 (1914), this Court in construing the Anti-Trust Act, p. 174, announced the rule of law as follows:

"It is true that there are no words of express ex-

clusion of the right of individuals to act in the enforcement of the statute or of courts generally to entertain complaints on that subject. But it is evident that such exclusion must be implied for a two-fold reason: First, because of the familiar doctrine that 'where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes.' *Farmers' & Mechanics' National Bank* v. *Dearing*, 91 U. S. 29, 35; *Barnet* v. *National Bank*, 98 U. S. 555; *Oates* v. *National Bank*, 100 U. S. 239; *Stephens* v. *Monongahela Bank*, 111 U. S. 197; *Tenn. Coal Co.* v. *George*, 233 U. S. 354, 359."

In *United States* v. *Babcock*, 250 U. S. 328 (1919), this Court in construing an 1885 statute with respect to the question whether the Treasury Department had exclusive jurisdiction to the exclusion of the Court of Claims, p. 331, stated:

"These general rules are well settled: (1) That the United States, when it creates rights in individuals against itself, is under no obligation to provide a remedy through the courts. *United States ex rel. Dunlap* v. *Black*, 128 U. S. 40; *Ex Parte Atocha*, 17 Wall. 439; *Gordon* v. *United States*, 7 Wall. 188, 195; *DeGroot* v. *United States*, 5 Wall. 419, 431-433; *Comegys* v. *Vasse*, 1 Pet. 193, 212. (2) That where a statute creates a right and provides a special remedy, that remedy is exclusive. *Wilder Manufacturing Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, 174-175; *Arnson* v. *Murphy*, 109 U. S. 238; *Barnet* v. *National Bank*, 98 U. S. 555, 558; *Farmers' & Mechanics' National Bank* v. *Dearing*, 91 U. S. 29, 35."

In *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297 (1943), this Court, p. 301, stated:

"Whether the imposition of judicial review on top of the Mediation Board's administrative determination would strengthen that protection is a considerable

question. All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced. *Tutun* v. *United States*, 270 U. S. 568, 576-577. *In such a case the specification of one remedy normally excludes another.*" (Emphasis ours.)

See also, *Texas and Pacific Railway Company* v. *Abilene Cotton Oil Company*, 204 U. S. 426 (1907).

V.

REPUBLIC HAS NOT VIOLATED SECTION 13 OF THE RIVERS AND HARBORS ACT OF 1899 (33 U. S. C. A. 407).

A. This Section Prohibits the Discharge from Any Manufacturing Establishment of "Any Refuse Matter of Any Kind or Description Whatever Other Than That Flowing from Streets and Sewers and Passing Therefrom in a Liquid State, Into Any Navigable Water of the United States. * * *" This Exception Specifically Permits Republic to Have Its Sewers Empty Into the Calumet River. Waters in These Sewers Are in a "Liquid State."

Section 6 of the Act of 1894 in part provided (Govt. Br. p. 60):

> "That it shall not be lawful to place, discharge, or deposit, by any process or in any manner, ballast, refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any other matter of any kind other than that flowing from streets, sewers, and passing therefrom in a liquid state, in the waters of any harbor or river of the United States, * * *."

Attorneys for petitioner state (Govt. Br. p. 61):

> "An examination of the legislative history of the Act of 1894 throws no light on why the exception of waters flowing from sewers was made, there having been no discussion of the clause in either the reports or the debates on the bill."

Section 2 of the Act of June 3, 1896 (Govt. Br. p. 53) provided:

> "That the Secretary of War is directed to cause to be prepared a compilation of all general laws that have been enacted from time to time by Congress for the maintenance, protection, and preservation of the navigable waters of the United States which are now in force, and to submit the same to Congress at its session in December next, *together with such recommendation as to revision, emendation, or enlargement of the said laws as, in his judgment, will be advantageous to the public interest.*". (Emphasis ours.)

On February 13, 1897 the Secretary transmitted to the Congress his Report in which he stated:

> "In pursuance of the foregoing provision of the act, I have the honor to submit herewith (1) a compilation of the general laws relating to the maintenance, preservation, and protection of navigable waters of the United States now in force, and (2) a draft of an act embodying such *revision and enlargement* of the aforesaid laws as the experience of this office has shown to be *advantageous to the public interest.*" (H. D. 293, 54th Cong., 2d Sess., p. 2.) (Emphasis ours.)

Senator Frye (Govt. Br. pp. 54-55) stated the revisions contained "some very few amendments to make the laws more certain" and "slight changes to remove ambiguities." Attorneys for petitioner admit (Govt. Br. p. 55) "The bill was enacted into law with no specific discussion in either house of the contents of this amendment."

Attorneys for petitioner admit also (Govt. Br. p. 57):

> "One change in particular is to be noted, the change of 'obstruction' in Sec. 10 of the 1890 to 'structure' in Sec. 12 of the 1899 Act. No explanation for this change appears in the War Department's letter accompanying the Proposed Act nor at any other point in the legislative history."

Thus there is nothing in the Senate or House debates or reports or any other history of the 1890, 1894 and 1899 Acts which will aid this Court in the construction of the various sections in the 1899 Act.

The words used in the street run-off and sewer exception in Section 13 of the 1899 Act, 33 U. S. C. A. 407, should be given their ordinary meaning as understood by Congress at the time of the passage of the 1899 Act. *Great Northern Railway Co.* v. *United States*, 315 U. S. 262, 273; *United States, et al.* v. *Missouri Pacific Railroad Co.*, 278 U. S. 269. If the words in the exception are not given their common and ordinary meaning, then the exception means nothing.

There are 5 miles of paved streets and 1¼ miles of unpaved streets within Republic's plant (R. 1421). There are also 37 miles of railroad tracks within Republic's plant (R. 1421). Along the streets within the plant there are approximately 113 catch basins which carry storm water to the nearest sewer and then to the Calumet River (R. 1421).

The water passing through the sewers from Republic's plant is in a liquid state. The percentage of the water in the sewer effluents of Republic is in excess of 99.9% (R. 2101). State regulatory agencies and interstate compact agencies consider solids in sewer outfalls similar to Republic to be in a liquid state (R. 2101).

Suspended solids in Republic's sewers are less than 1 part in 1000. The sewers of Republic, which discharge into the Calumet River 60,000 gallons of water per minute (when the plant is operating 100% of capacity), are in a liquid state, even though these waters contain suspended solids less than 1 part in 1000. Some of these parts cannot be seen even by the use of a microscope (R. 1300).

The exception clause in Section 407 is specific. It refers

to a special type of refuse matter. That is, refuse matter flowing from streets and sewers and passing therefrom in a liquid state. The clause distinguishes that type of refuse matter from "refuse matter of any kind or description whatever." When general language and specific language are used in the same statute, the specific language prevails, no matter how inclusive the general language of the statute may be. *United States* v. *Chase*, 135 U. S. 255, 260 (1890); *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208 (1932); *Fourco Glass Co.* v. *Transmirra Corp.*, 353 U. S. 222, 228-9.

Furthermore, Congress dealt separately and differently in Section 411 for violations of Section 407. The remedial provisions of other sections of the 1899 Act cannot be extended to the violation of Section 407. *Iselin* v. *United States*, 270 U. S. 245, 250 (1926).

Section 403 does not deal specifically with the discharge of refuse matter. Therefore, even if some of the clauses in Section 403 could possibly be construed to apply to Republic's sewers, the specific exception in Section 407 would be the controlling and exclusive statute applicable to Republic's sewers.

Attorneys for the government state (Govt. Br. p. 37, footnote) "We rely on all four, and are not compelled to elect one." This position violates fundamental principles of law and fundamental methods of statutory construction.

In 1894, when Congress first referred to "any other matter of any kind other than that flowing from streets, sewers, and passing therefrom in a liquid state" (Govt. Br. p. 60) and again in 1899 when Congress passed Section 407, it was common practice for sanitary sewage and industrial wastes and refuse matter of many kinds and descriptions to flow into the navigable waters of the United States. If Congress intended to make unlawful the flowing of water from streets and sewers in a liquid state, it could

have done so by the use of specific and unambiguous language. Congress did not do so. It specifically excepted refuse matter "flowing from streets and sewers and passing therefrom in a liquid state." The practice then was and is now for the government to dredge in the navigable waters of the United States. This has been done in the Calumet River.

In the report of the Chief of Engineers, U. S. Army, for 1951 the amount of $72,500 was allotted to dredging in the Calumet River. The same report stated that the "sum of $185,000 can be profitably expended for the following scheduled work for the fiscal year 1953." This work included flue dust and miscellaneous investigations, $35,000, and dredging of the Calumet River $150,000. Maintenance expense for the Calumet River to June 30, 1951 amounted to $3,135,184.57. See report of Chief of Engineers, U. S. Army, 1951, Appendix, *infra*.

The correspondence from the office of the Chicago District Engineer to various industries along the Calumet River shows diligence on the part of the Chicago office. It does not aid in the construction of the 1899 statutes. The shifting of the burden of dredging navigable waters from the federal government to private industry and municipal corporations may be brought about by a statute passed by Congress. Congress has passed no such statute. Correspondence from the office of the District Engineer in Chicago cannot enlarge upon or create duties which only Congress can create.

VI.

EVEN IF REPUBLIC HAS VIOLATED SECTION 13 OF THE RIVERS AND HARBORS ACT OF 1899, THERE IS NO REMEDY OF INJUNCTION.

A. Section 16 of the Rivers and Harbors Act of 1899 (33 U. S. C. A. 411) Provides a Specific Remedy for the Violation of Section 13. That Remedy Is Fine or Imprisonment. It Is the Exclusive Remedy. No Remedy by Injunction Is Provided.

Section 16 of the Rivers and Harbors Act of 1899 provides a remedy for the violations of "Sections thirteen, fourteen and fifteen" of the 1899 Act. These sections are 33 U. S. C. A. 407, 408 and 409.

The only remedy provided in Section 411 for a violation of Section 407 is fine or imprisonment. There is no remedy of injunction. The remedy of fine or imprisonment is the *exclusive* remedy for violation of Section 407, as noted in Point IV of this Argument with respect to Section 406. If additional remedies are desirable, it is for Congress, and not for Courts, to provide them.

VII.

THE UNITED STATES IS NOT ENTITLED TO DAMAGES REPRESENTING THE COST OF DREDGING.

There was no prayer for damages in the complaint or the amended complaint. No claim for damages was made in the trial court or in the Court of Appeals. It is made in this Court for the first time.

Attorneys for petitioner are seeking a remedy which Rule 54(c) does not permit—the recovery on a cause of action different from that on which the complaint is based. *Rosenfield v. Lion Manufacturing Corp.*, 253 F. 2d 90 (1958).

Furthermore, as heretofore pointed out in Point IV and Point VI of this Argument, the specific remedies named in the 1899 statutes are the *exclusive* remedies. No remedy for damages is provided for in the 1899 statutes. Therefore, the remedy of damages is not available to the United States in this case.

CONCLUSION.

The decision of the Court of Appeals in this case is correct. It should be affirmed by this Court. The Court of Appeals stated "We find no occasion to state or discuss the numerous other grounds upon which defendants attack the validity of the decree. We hold there is no legal basis, statutory or otherwise, upon which the government is entitled to injunctive relief." If this Court should find there is a legal basis for injunctive relief, then we ask that this Court remand this case to the Court of Appeals in order that we may argue the numerous other grounds relating to the invalidity of the decree.

Respectfully submitted,

PAUL R. CONAGHAN,
208 South La Salle Street,
Chicago 4, Illinois,

H. C. LUMB,
Republic Building,
Cleveland 1, Ohio,
Attorneys for Republic Steel Corporation.

STEVENSON, CONAGHAN, HACKBERT,
ROOKS AND PITTS,
208 South La Salle Street,
Chicago 4, Illinois,
Of Counsel.

APPENDIX.

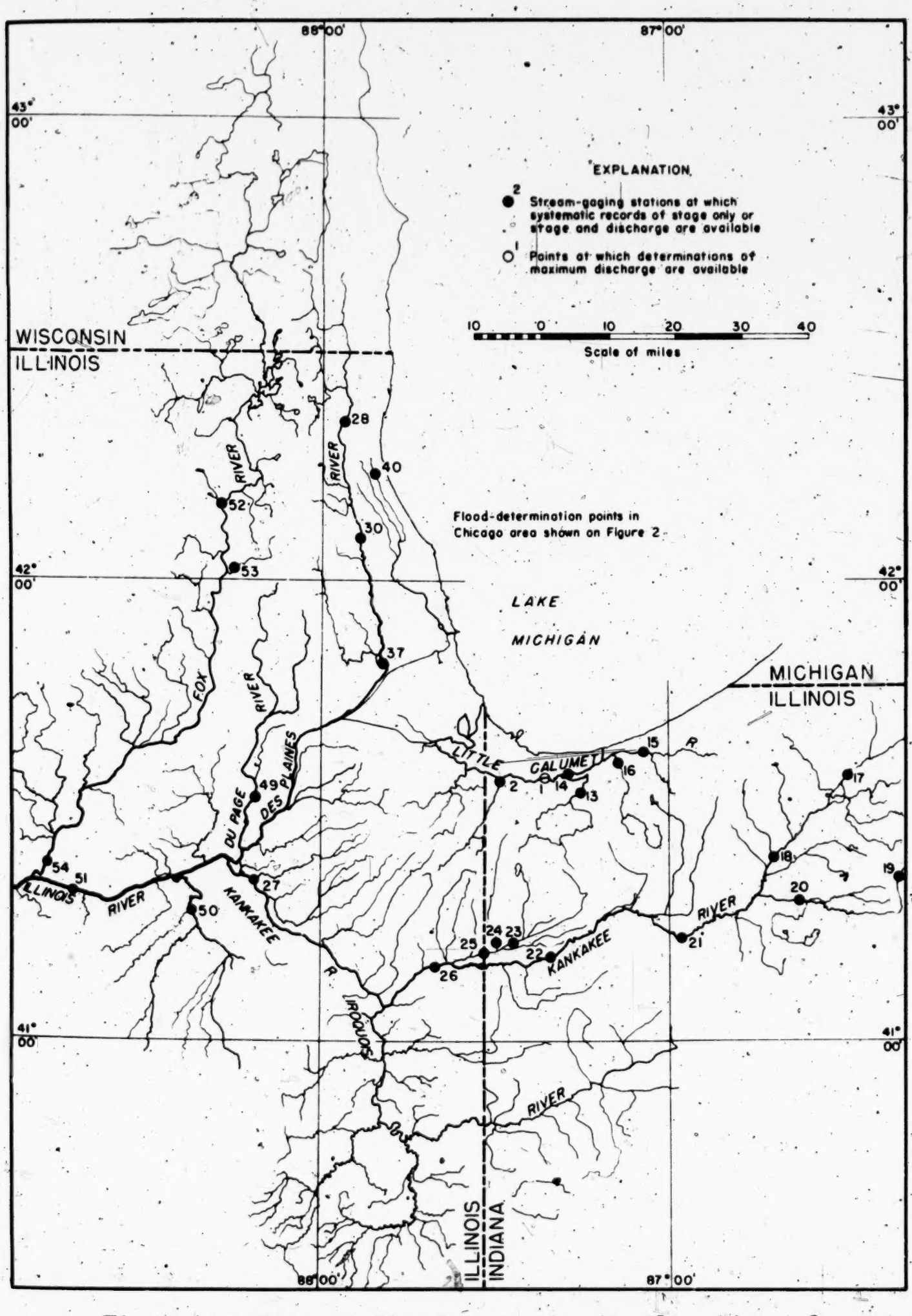

Figure 1.--Map of flood area showing location of flood-determination points

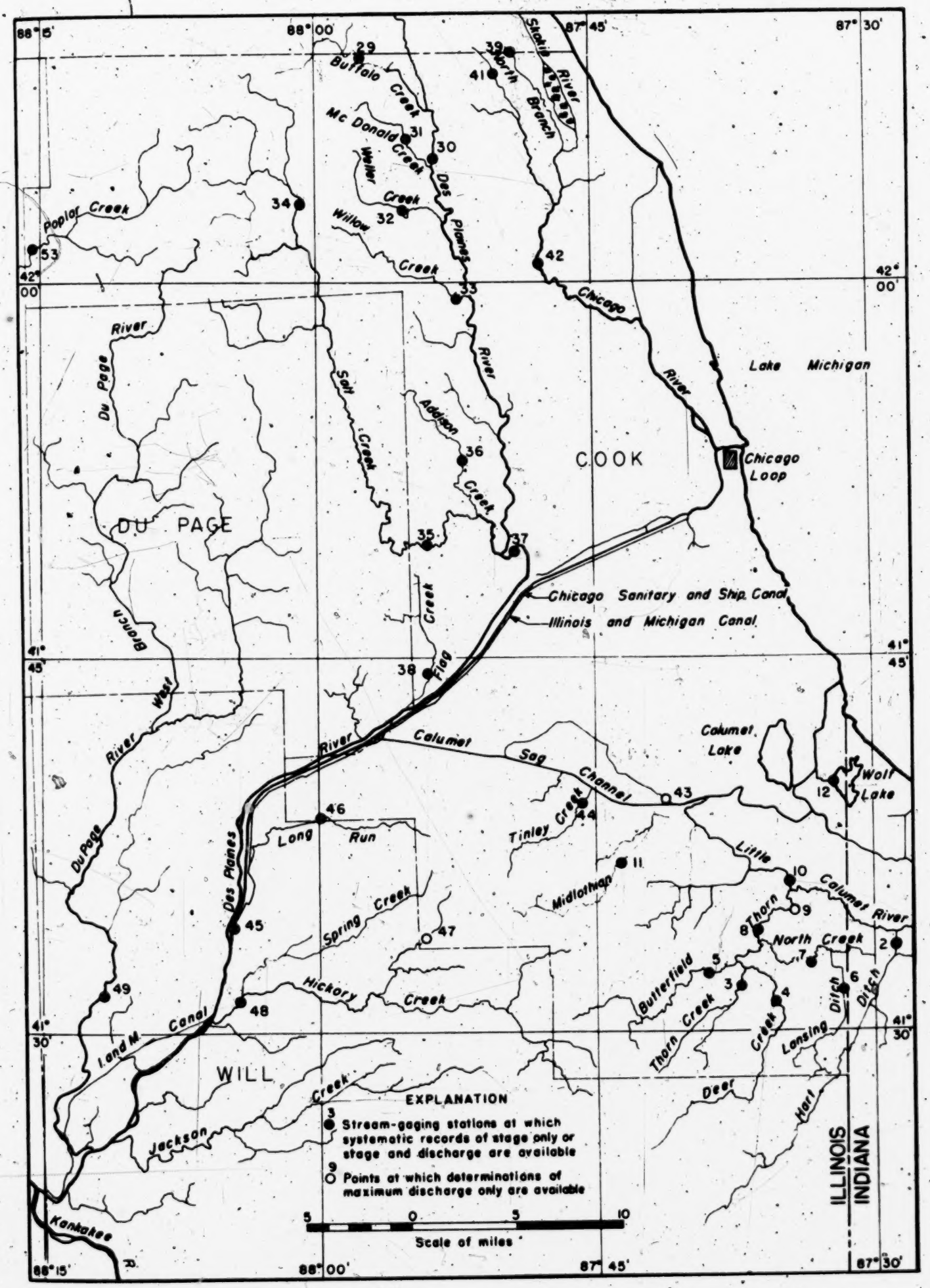

Figure 2.--Map of Chicago area, Cook County, showing location of flood-determination points

2,961 feet in length and 50 feet southerly of the pier's original location. Under permits from the Department, the Defense Plant Corporation has built two sections of bulkhead on the east side of the river between a point opposite the Semet-Solvay slip and the new turning basin 3 at mile 4.7. The United States has widened and deepened the channel adjoining the new bulkhead except along the rock section, where the widening was done by the corporation. Depths in the outer harbor vary from 21 to 28 feet. Controlling mid-channel depth in the entrance channel is 24.7 feet. The controlling mid-channel depth in the river is 18.0 feet, up to and including turning basin 5. Depths are based on soundings taken in May, August 1950, and June 1951, and are referred to low-water datum. The mean water level in June 1951 was 2.67 feet above datum. The head of navigation for deep-draft vessels in the river is at turning basin 5 at the entrance to Lake Calumet.

The total cost, all funds, to June 30, 1951 was $8,707,432.94, of which $5,670,829.89 were regular funds and $3,036,603.05 were Public Works funds; $5,616,541.19 being for new work and $3,090,891.75 for maintenance. The total expenditures were $8,706,495.28 including $3,036,603.05 Public Works funds.

Proposed operations. The balance unexpended at the end of the fiscal year amounting to $937.66 plus accounts receivable of $652.95 and an allotment of $107,500.00, a total of $109,090.61 will be applied as follows:

Accounts payable, June 30, 1951	$1,590.61
Maintenance:	
Sounding, sweeping, flue dust, and miscellaneous investigations, by hired labor, fiscal year 1952	$35,000.00
Dredging in the river, by contract, May 1–June 30, 1952	72,500.00
Total maintenance	109,090.61

The sum of $185,000 can be profitably expended for the following scheduled work during the fiscal year 1953:

Maintenance:	
Sounding, sweeping, flue dust, and miscellaneous investigations, by hired labor	$35,000
Dredging in river, by contract	150,000
Total maintenance	185,000

Cost and financial summary

	Fiscal year ending June 30—					Total to June 30, 1951, including fiscal years prior to 1947
	1947	1948	1949	1950	1951	
New work:						
Appropriated	$6,210.00			−$3,130.59		$6,472,514.22
Cost	4,905.30	$6,397.74		43.30		6,472,514.22
Expenditures	4,594.26	7,167.35		43.30		6,472,514.22
Maintenance:						
Appropriated	−17,800.00	176,000.00	$19,000.00	211,000.00	$22,752.30	3,136,122.23
Cost	9,687.11	160,852.91	34,799.35	210,176.92	23,619.58	3,136,122.23
Expenditures	11,864.97	168,502.93	26,468.65	207,106.86	25,736.20	3,135,184.57

Other new work data:
Estimated additional amount needed to be appropriated for completion of existing project $5,529,460

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 56

UNITED STATES OF AMERICA,
Petitioner,

vs.

REPUBLIC STEEL CORPORATION, INTERNATIONAL HARVESTER COMPANY, AND INTERLAKE IRON CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT INTERNATIONAL HARVESTER COMPANY.

PETER A. DAMMANN,
DAVID G. MOYER,
W. S. BODMAN,
GEORGE W. THOMPSON,
120 West Adams Street,
Chicago 3, Illinois,
Attorneys for Respondent, International Harvester Company.

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IN THE

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT INTERNATIONAL HARVESTER COMPANY.

OPINIONS BELOW.

The memorandum of the District Court (R. 91-97) is reported at 155 F. Supp. 442. The opinion of the Court of Appeals (R. 2559) is reported at 264 F. 2d 289.

JURISDICTION.

The basis of this Court's jurisdiction is correctly set forth by petitioner.

STATUTES AND RULES INVOLVED.

Petitioner cites Section 10 of the Rivers and Harbors Act of September 19, 1890, 26 Stat. 426, 454, and Sections 10, 12, 13, 16, 17 and 20 of the Rivers and Harbors Act of March 3, 1899, 30 Stat. 1121, 1151-1155, as amended, 33 U. S. C. 403, 406, 407, 411, 412, 413, 415. (Since these statutes are correctly quoted in the appendix to petitioner's brief, they are not set forth here.)

In addition to the Rivers and Harbors legislation quoted by petitioner, Harvester sets forth in the Appendix to its brief Section 6 of the Rivers and Harbors Act of September 19, 1890, 26 Stat. 426, 453, as casting light upon the appropriate interpretation of the 1899 legislation.

QUESTIONS PRESENTED.

1. Whether the discharge of industrial wastes from the sewers of International Harvester Company, herein designated "Harvester," in the manner and in the amounts shown by the record in this case, violates Section 10 of the Rivers and Harbors Act of 1899, 33 U. S. C. 403.

2. Whether the discharge of industrial wastes from the sewers of Harvester in the manner and in the amounts shown by the record in this case, violates Section 13 of the Rivers and Harbors Act of 1899, 33 U. S. C. 407.

3. Assuming for argument that there is a violation of either of the sections referred to in Questions 1 and 2, whether the decree properly awarded the relief of mandatory and prohibitory injunctions.

4. Whether petitioner may now urge here for the first time an alternative claim for damages.

5. Whether this Court should consider self-serving correspondence which was not offered in evidence and is not a part of the record, but which petitioner has "lodged" with the clerk of this Court and has referred to in its brief.

Note.

In the Court of Appeals Harvester and the other respondents assigned error, *inter alia,* that the findings were clearly erroneous in that they were based upon incompetent and speculative evidence; that certain findings were supported only by inference and conjecture; that they were conflicting; and that they contradicted undisputed evidence. In that court Harvester attacked the mandatory portion of the decree as ambiguous and incomprehensible.

One of Harvester's main contentions in the Court of Appeals was that the conclusion of the trial court that it and the other two respondents were responsible for 81.5% of the shoaling in a stretch of the channel more than 3½ miles long was absurd, was based on the assumption that *all* "unnatural" materials in the river was attributable to respondents, and flew in the face of common knowledge that the river, upstream from respondents' plants as well as downstream, is saturated with dirt.

The Court of Appeals found that there was no occasion to consider these questions and did not decide them.

It appears that petitioner (Pet. Br., p. 3) is of the opinion that these questions are not within the scope of this present certiorari, and we agree with petitioner. We understand that in the event this Court finds that the Court of Appeals was in error, the case will be remanded to the Court of Appeals for consideration of the questions presented by respondents but not decided by it.

STATEMENT.

This case involves the industrial use of water in the manufacture of iron and steel. After being used, the water is returned to its source, the Calumet River. The locale is the large industrial area at the south end of Lake Michigan. The Calumet River, which is entirely within the State of Illinois,[1] now and for some years past, has flowed south and by canals to the Mississippi River.

As a convenience to the Court, there is attached as an exhibit to this brief a small scale chart of the portions of the Calumet River with which this suit is concerned. This chart is included as a part of several Government exhibits received in evidence. See for example Government Exhibit 171.[2]

The United States brought this action against respondents, which operate three of the steel or iron mills located along the Calumet River. The original and amended com-

1. Petitioner states (Brief, p. 3) that "Calumet Harbor is located some eleven miles south of Chicago on Lake Michigan on the Illinois-Indiana line." If by Calumet Harbor petitioner intended to refer to the mouth of the Calumet River, petitioner is in error. As this Court stated in *Cummings* v. *Chicago*, 188 U. S. 410, 427, (1903), "Calumet River, it must be remembered, is entirely within the limits of Illinois, and the authority of the State over it is plenary, subject only to such action as Congress may take in execution of its power under the Constitution to regulate commerce among the several States." The relevant portions of the river and harbor are located entirely within the corporate limits of the City of Chicago.

2. By leave of the Court of Appeals and upon stipulation, this and several other exhibits consisting of charts or tables were not printed in the Appendix to the briefs filed in the Court of Appeals and are not printed in the record here. In accordance with the order of that court, the original and three copies of those exhibits were filed with that court and leave was given to refer to them in the briefs and upon oral argument. In accordance with Rule 38 of this Court, any exhibits referred to in the brief of this respondent or which may be referred to in oral argument will be placed in the custody of the Marshal of this Court at least one week before oral argument.

plaints charged that incident to the operation of its mills each respondent discharged and deposited into the channel of the river industrial solids and flue dust, thereby allegedly reducing the depth of the river and hindering navigation in violation of Sections 403 and 407 of Title 33 of the United States Code. (R. 8, 72.)

In its original complaint (R. 9) the Government prayed for a decree restraining respondents from discharging industrial wastes into the river without first obtaining a permit from the Department of the Army providing for suitable and satisfactory conditions for removal of the wastes. The Government also prayed that the decree contain a mandatory order requiring respondents to restore the bed of the river "in front of, or abutting on, their mills or establishments to the original channel depth of twenty-one (21) feet." (R. 9.)

The case was called for trial on February 20, 1956. On March 16, 1956, petitioner filed a motion for leave to amend its complaint. (R. 69, 1689). Over objection petitioner filed its amended complaint which prayed the same restraining order as the original complaint but which prayed for a mandatory order requiring respondents by dredging or otherwise to "restore the federal channel of the Calumet River between Stations 105 and 300 to the original channel depth of twenty-one (21) feet."

That is to say, the amended complaint prayed that respondents be compelled to dredge more than three and one-half miles of channel, including a portion of the channel extending over one-third of a mile upstream from Harvester's plant and almost three miles downstream from Harvester's plant. The entire length of the 21 foot channel of the river, including the entrance channel is only six and one-half miles and excluding the entrance channel is somewhat less. (See chart in Appendix.)

The decree granted the prayer of the amended complaint (R. 111) and contained two separate injunctions:

(1) It restrained the defendants from depositing industrial solids into the federal channel of the Calumet River without first obtaining a permit from the Chief of the Engineers of the Department of the Army providing for "satisfactory conditions" for the removal of the future deposits and discharges from and after one year from the date the decree was entered.

(2) It "enjoined and ordered" each of the respondents to restore the channel to a depth of 21 feet between Stations 105 and 300 within one year. As to Harvester, paragraph 3 of the decree provided: "The amount of the dredging to be done by said defendant, International Harvester Company, shall be determined in the following manner:

> "36.31% of 81.5% of the aggregate of the industrial solids or wastes, including flue dust, found in the federal channel of the Calumet River aforesaid, and the total of the dredgings of each of the three defendants herein since 1951 in said federal channel, less the total of any dredging the said International Harvester Company may have done in the said federal channel since 1951." (R. 113.)

The decree failed to define "industrial solids or wastes", and failed to indicate how, if Harvester were to dredge the channel pursuant to the decree, Harvester could ascertain when it had removed "36.31% of 81.5% of the aggregate of the industrial solids or wastes." Neither the decree, the findings of fact, nor the opinion indicate what percentage of the shoals in the federal channel consist of "industrial solids or wastes."

The United States Court of Appeals for the 7th Circuit reversed and remanded the cause with directions that the complaint be dismissed. In the conclusion of its opinion

the 7th Circuit stated that "We find no occasion to state or discuss the numerous other grounds upon which defendants attack the validity of the decree. We hold there is no legal basis, statutory or otherwise, upon which the Government is entitled to injunctive relief." (R. 2580.)

Although the case comes here on the legal questions tendered by the Petition for Certiorari whether the 7th Circuit was correct in its conclusion that there was no legal basis for granting to petitioner injunctive relief, petitioner injects for the first time in this Court an alternative contention that if it were not entitled to equitable relief, the case should be remanded for the assessment of damages. The Government never made this argument in the Court of Appeals nor in the District Court and did not petition the Court of Appeals for a rehearing. It is Harvester's position that petitioner has not made out a case for damages. Of course any quantitative determination of liability, either with respect to a mandatory injunction such as the trial court entered or with respect to damages, will require a consideration of the evidence as to quantitative responsibility and of the assignments of error urged upon, but not decided by, the Court of Appeals.

Harvester's Operations.

As the chart will indicate, Harvester's Wisconsin Steel Division operates a steel plant on the west bank of the Calumet River at about 110th Street. It maintains what is referred to as the Wisconsin Slip and Semet-Solvay Slip, sharing the latter with the adjacent Plant 2 of respondent Interlake.[1] Lake Michigan flows into the Calumet

1/ For ease of reference the Government has divided the relevant stretch of the Calumet River into "stations" and has assigned station numbers to various points on the center of the channel, sometimes marked on wharves and other structures along the river bank. As more fully indicated on the chart attached to this brief, Station No. 0 has been assigned to the point where the

River, which, in turn, flows south, except during short periods of excessively heavy rainfall. (Finding 5, R. 99.)

Harvester, at the time of the trial, had 4600 employees and a monthly payroll of $1,800,000 (R. 1537). It operates a coke plant, blast furnaces, open hearth furnaces, four finishing mills and a blooming mill in making pig iron and steel. A reasonably fair approximation of production would be half a million tons of pig iron and a million tons of steel per year. (R. 1539.)

In its several operations Harvester uses water (R. 101) which it pumps from the Calumet River and ultimately returns to the Calumet River through sewers. Some of this water is used in cooling the rolls in the finishing mills and blooming mill. As the water is poured over the rolls, it picks up a certain amount of mill scale, particles of iron oxide which flake off the metal as it cools. (R. 1544.) The water collects in a trough underneath the rolls, flows to a settling pit, and thence to sewer outfalls and to the river.

Other water is used to wash gas from the blast furnaces. This water, after it is used in the gas washer for each of the blast furnaces, goes to a Dorr thickener, which is designed to remove and recapture solids from the water. (R. 1550.) The solids recovered by the thickener are reused in Harvester's manufacturing processes. The effluent of the thickener is discharged into the river. The thickener is more than 98% efficient in removing industrial solids from the water. (R. 1460.)

river passes into the entrance channel. Successive stations are designated at 100-foot intervals south along the center line of the channel. (R. 308.) The Government successfully maintained in the trial court that the defendants should dredge portions of the channel from Station 105 south to Station 300, which is south of Turning Basin No. 5 and north of 130th Street — a distance of three and two-third (3⅔) miles. The relevant operations of defendant Harvester are approximately Station 127 to approximately Station 147 along the west bank of the Calumet River. (R. 1376.)

Other water is used in other cooling operations in closed circuits and thus returns to the river as pure as when it was pumped out of the river. (R. 1551.) Still other water is used to quench coke in connection with the manufacture of coke. This water comes in contact with the coke and contains some fine particles of coke. Before it is discharged into the Calumet River it goes through each of three sections of a settling tank. (R. 1555.)

The operations of the other two respondents (so far as the issues in this case are concerned) are substantially similar to those of Harvester. None of the respondents deposits sanitary sewage into the river.

Sewer Effluent Content and Shoaling.

Much of the evidence introduced at the trial was directed to the issue of the quantitative responsibility of respondents, an issue not reached by the Court of Appeals. In this Statement Harvester does not refer in detail to the vast amount of evidence offered with respect to respondents' alleged responsibility for shoaling. Some of that evidence will be referred to herein where the construction of the phrase "liquid state" (Sec. 407) and of the word "obstruction" (Sec. 403) is considered. It therefore seems proper to refer briefly to that evidence and the respective theories of the parties.

The Government and respondents followed different methods of determining how much of the material in the river was the result of the operations of respondents. The method used by respondents was to determine by testing the average number of grains per gallon of solid material in the respective sewer effluents during a period of capacity operations. (R. 1765-1768.) Then the number of gallons of water used was determined on the basis of the pumps operating at 100% capacity and the amount

of material discharged since 1951, the date the last dredging, was computed. Harvester Ex. 7, 7A, 9, 9A, 9B (R. 2443-2449). Testimony of Brady (R. 1819 *et seq.*). The total so ascertained was then converted by a formula into cubic yards in the river. The trial court rejected this approach as not reliable (Finding 31, R. 104), although it used the results of the computation to determine the respective percentage liabilities of respondents. (R. 95.)

The method used by the Government in arriving at its version of the amount of material in the river due to the operations of respondents was to examine the channel bed, calculate the amount of shoaling, test the sewer effluents qualitatively, determine the chemical and physical characteristics of the material in the channel and attempt to ascertain its source. (R. 1282, 1979.) Government witnesses presented as experts then gave their estimates as to the liability of the respondents. The method of the Government, which starts with the channel bed and works back to sewer effluents, depends upon qualitative tests of the effluents and the channel bed, but avoids the direct approach of measuring the amount of materials discharged. Harvester, and the other respondents, objected that this method involved unwarranted inferences and arbitrary assumptions and that there was no competent evidence to justify the application of the method; but the trial court accepted the evidence.

Pursuing this method a Government expert, by a simple mathematical computation (R. 1339), estimated the total responsibility of respondents for the shoaling in the river at 69.6%. (R. 1289, Govt. Ex. 184; R. 1294, 2519.) As "an example" of calculations which "could be made" (R. 1291), the same witness estimated that respondents were responsible for 93% of the material in the river. (R. 1293.) The trial judge split the difference between the two estimates of the same witness and found that re-

spondents had contributed not less than 81.5% "of the industrial wastes" in the federal channel. (Finding 43, R. 106. Opinion, R. 93.)

Government witnesses testified that there are some 37 other sewers which continuously or intermittently discharge into the river. (R. 367, 372, 429.) The Government did not take samples of the effluents from any of the sewers other than those of respondents. (R. 429.) An expert testified for respondents that sewers of Commonwealth Edison Company (R. 2037), Great Lakes Carbon Corporation (R. 2039), Globe Asphalt Co. (R. 2040), General Chemical Co. (R. 2040, 2043), Ford Motor Company (R. 2046), the Allied Chemical Co. (R. 2047), make significant contributions of industrial solids to the river.

SUMMARY OF THE ARGUMENT.

I. The discharges which flow from respondents' sewers do not violate Sections 10 and 13 of the Rivers and Harbors Act of 1899. (33 U. S. C. §§ 403, 407.) Section 10 pertains to obstructions to navigation. The effluent flowing from respondents' sewers and consisting of 99.98% water and minute particles of industrial solids does not constitute an obstruction within the meaning of that section. Moreover, Section 13 applies specifically to respondents' sewers. It forbids the discharge or depositing in navigable waters of "any refuse matter of any kind or description whatever" but specifically excepts "refuse matter * * * flowing from streets and sewers and passing therefrom in a liquid state." The liquid state exception applies to the effluent from respondents' sewers, and, therefore, respondents' industrial wastes do not constitute an unlawful obstruction. Hence Section 13 will be argued first.

A. The thickeners and settling basins at respondents' plants remove about 98% of solids from the industrial wastes before they flow from the sewers into the Calumet. The effluent from the plants average more than 99.98% water. Most of the remaining industrial solids consist of tiny particles of flue dust. Of these the "worst offenders" are too small to be seen in a microscope, smaller than a wave length of light and less than one micron in size. A glass containing 99.98% water and such tiny particles of suspended matter would seem clear if held up to the light.

A holding that such matter in such proportions when flowing out of respondents' sewers does not come within the liquid state exception would deprive the exception of any meaning. Every sewer—sanitary, storm or industrial

—contains some suspended matter. Even filtered city tap water contains suspended solids which will settle out if left in a drinking glass over night.

The liquid state exception was added to the Rivers and Harbors Act of 1890 by Section 6 of the Act of August 18, 1894. It was repeated verbatim in the 1899 codification. Petitioner states that there is no relevant legislative history concerning the exception. (Pet. Br. p. 61.) Accordingly, it should be construed in the light of the conditions which existed in 1894. In 1900, out of a total urban population of more than 30,000,000, the total urban population which provided any treatment for domestic and industrial wastes was only 1,000,000.

In 1940 Congress approved the Interstate Compact to control pollution of the Ohio River system. Article VI provided that unless otherwise determined by the Commission, industries could discharge into the Ohio industrial wastes from which not less than 45% of suspended solids had been removed. It would be surprising for Congress in 1940 to approve the discharge into the Ohio River of industrial wastes from which 45% of the suspended solids had been removed, if Congress in 1894 and 1899 had intended to forbid the discharge of wastes from which 98% of the solids had been removed and which consisted of 99,98% water.

An intent to impose upon industry the burden of maintaining navigable waters should not be attributed to Congress in the absence of the clearest language.

B. Under accepted rules of statutory construction, the specific and comprehensive language in Section 13 permitting discharges from respondents' sewers of "refuse matter * * * flowing from streets and sewers and passing therefrom in a liquid state" should control over the general language in Section 10 forbidding obstructions.

The legislative history and the administrative interpretation of the 1890, 1894 and 1899 statutes indicate that Congress intended the specific exemption contained in Section 13 to exclude the application of the general prohibition contained in Section 10.

C. But if, despite the specific language of Section 13, Section 13 is not construed as governing the subject of discharge of wastes flowing from respondents' sewers to the exclusion of the other sections of the Act, nevertheless Section 10 of the Act does not forbid the discharges from respondents' sewers. Section 10 pertains to the construction or building of things or objects which obstruct navigation. Thus the second clause of the section forbids the construction of wharfs, etc., or "other structures" in any navigable waters. The industrial solids suspended in 99.98% water in respondents' sewers are not structures within the meaning of this clause. *United States* v. *Wilson*, 235 Fed. 2d 251, 253 (C. A. 2d 1956). The third clause of the section makes it unlawful to excavate or fill or to alter or modify the channel "unless the *work* has been recommended" by the Chief of Engineers and authorized by the Secretary of the Army. The flowing of industrial solids from respondents' sewers is not a "work" which could be authorized by the Secretary of the Army.

The only relevant holdings of lower Federal courts lend persuasive support to our contention that the flue dust in the effluent flowing from respondents' sewers does not constitute an obstruction within the meaning of Section 10 of the 1899 Act.

There is nothing in legislative history of the statute which would indicate that Congress intended in Section 10 to forbid the discharging into navigable waters of sewer effluent containing a small percentage of tiny particles of suspended solids. In the absence of the clearest language,

an intention should not be attributed to Congress in 1899 to make such a revolutionary change in accepted industrial techniques as to forbid the discharge of industrial wastes into navigable waters.

II. But if the discharges from respondents' sewers constitute a violation of the 1899 statute, petitioner nonetheless was not entitled to injunctive relief. The statute details specifically the remedies for violations. These remedies are exclusive. The remedies for a violation of Section 13 are set forth in Section 16 of the 1899 Act (33 U. S. C. §§ 411, 412) and are limited to fines or imprisonment. The remedies for a violation of Section 10 are set forth in Section 12 which makes a violation a misdemeanor punishable by a fine or imprisonment. It further authorizes an injunction for "the removal of any *structures* or *parts of structures*."

That this is the proper meaning of Section 12 becomes clear from its legislative history. Section 10 of the 1890 statute prohibited the "creation of any obstruction" to navigable waters. It made the creation of an obstruction a misdemeanor and provided that the "creating or continuing of any unlawful obstruction under this Act mentioned may be prevented and such obstruction may be cause to be removed" by an injunction. This section was inconsistent with and hence repealed by Sections 10 and 12 of the 1899 Act. Section 12 limited the use of injunction to the removal of a "structure." The 2nd Circuit in *United States* v. *Wilson*, 235 Fed. 2d 251 (1956), held that a sunken barge was not a structure within the meaning of Section 12, and that, therefore, the United States could not obtain an injunction to compel the removal of the barge.

III. Petitioner presents new issues of law and offers new evidence in this Court. Such new matter should not be considered.

A. Petitioner prayed for injunctive relief in the trial court and never intimated in that court or in the Court of Appeals that it was entitled to damages. It makes that contention for the first time here.

B. Petitioner also for the first time urges that the 1890 statute is in force.

C. Petitioner "lodged" (Pet. Br. p. 64) with the clerk of this Court a file of correspondence which had never been offered in evidence and which is not a part of the record and petitioner referred to the correspondence in its brief. The correspondence was not of such a nature that this Court could properly take judicial notice of it. Much of this "evidence" is correspondence between the Army Engineers and Illinois Steel Corporation, which is not a party to this suit.

It is respectfully submitted that in a certiorari case this Court should look only to the certified record in deciding questions presented and that this Court should not review questions not raised in the Court below. *Lauro v. United States*, 355 U. S. 339, 354, 362 n.

ARGUMENT.

I. RESPONDENTS HAVE NOT VIOLATED SECTIONS 10 AND 13 OF THE RIVERS AND HARBORS ACT OF 1899.

The United States Court of Appeals correctly decided that respondents have not violated Sections 10 and 13 of the Rivers and Harbors Act of 1899. (33 U. S. C. §§ 403, 407.) Section 10 of the 1899 statute forbids obstructions to navigation and contains some specific provisions about certain types of obstructions. Section 13 pertains to the discharge or deposit of "refuse matter" in navigable waters. That section most closely applies to the activities of these respondents.

Although the Government argues that these respondents have constructed an obstruction, have created "a fill," or have altered the channel in violation of Section 10, the main thrust of the Government's case is that the discharge from respondents' sewers of industrial wastes is unlawful. This is a subject matter which is expressly dealt with in Section 13.

A. The Effluent from Respondents' Sewers Is in a Liquid State and Falls Within the Express Statutory Exception of Section 13.

The relevant portion of Section 13 of the Act of 1899 (33 U. S. C. § 407) reads as follows:

> "It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever

> *. other than that flowing from streets and sewers and passing therefrom in a liquid state*, into any navigable water of the United States, * * * ." (Italics added.)

Thus the statute forbids the discharge and deposit of refuse matter "other than that flowing from streets and sewers and passing therefrom in a liquid state." As the terms are used in their everyday usage, the material in respondents' effluents is refuse matter in a liquid state.

The Court of Appeals stated (R. 2571) that the effluent from respondents' sewers averages more than 99¼% water. Actually, there is a great deal less material than that in the water. We call attention to the fact that one hundred parts per million is 1/100th of 1% and refer to Harvester's Exhibit 7. (R. 1773, 2443.) That exhibit shows the average of the daily tests taken from the six Harvester sewers which can carry material, the others (Harvester's Ex. 7A; R. 1773, 2445) discharging the water to which nothing has been added. Sewers No. 1 and 2 shown on the exhibit empty into the slip and not into the river. (Harvester's Ex. 1; R. 1555, 2437.) It will be noted that the greatest average parts per million shown by the exhibit is 264 for the No. 2 sewer which empties into the slip. The highest average parts per million from the sewers which empty into the river is 151 for Sewer No. 6. This means that the effluent from that sewer is 99.985% water. Petitioner attacked at the trial the sampling methods used but did not attack the computations. Government's Exhibit 131 is a compendium of effluent tests made by the Government and does not differ significantly from the testing by Harvester or, for that matter, by the other respondents. It is submitted that effluent which is 99.98% water is in a "liquid state."

Furthermore, Government witnesses (R. 1300) testified to the effect that the "worst offenders" contributed by respondents are particles too small to be seen in a micro-

scope and smaller than one micron, which is 1/1,000,000th of a meter. (R. 940.)

Professor Einstein noted that the great part of "the solids" is so small that it is not filterable. He said that the holes in a filter had a size "on the order of one micron." Materials slightly smaller than one micron will go through the filter. (R. 2190.) He said:

> "Now, you would say if a thing like that happens, then all you have to do is take the fluid that has gone through the filter, hold it against the light and see whether it is clear or not. That doesn't help either, because the wave length of the light we are using with our eyes to see, the wave length is also on the order of about one micron, and anything that is smaller than a micron is not seen.
>
> "The light just goes around it, as if the particles weren't there, and you see no difference whether the particles are there or not, so that means you can neither see them or you can hold them back in the filter, but they still are solid particles, and to make things worse, these particles which are just slightly or even considerably smaller than a micron, they are the worst as far as floeculation is concerned." (R. 2191.)

The contention urged by petitioner that such tiny particles, when suspended in a mixture where their occurrence is one, two or even three hundred parts per million, are not in a liquid state, would deprive the statutory language of any meaning whatsoever.

The statute speaks of "any refuse matter" "flowing from streets and sewers." It is a matter of common knowledge that run-offs of rain water from streets contain solid matter in suspension and that the run-offs are frequently brown or even muddy for that reason. Similarly, sanitary sewage consists almost entirely of matter in suspension, rather than matter in chemical solution. Even tap water which has been processed through a modern city

filtering plant contains suspended solids, probably several parts per million, which will settle out if left in a drinking glass overnight.

The effluent from respondents' sewers is unquestionably liquid within the accepted definition of that term *i.e.*, "flowing freely like water; fluid; not solid" (Webster's New International Dictionary [2 Ed. 1951]). Although the tiny particles suspended in the water are, when considered separately, solids, the mixture as a whole is a solution, *i.e.*, "The act or process by which a substance, whether solid, liquid, or gaseous, is homogeneously mixed with a liquid * * * the state of being so mixed" [*Ibid*].

Obviously what is and what is not a liquid is a question of degree. Large solids such as cinders might be deemed to fall outside the exception. As indicated in the Statement, respondents remove all or substantially all of such solids by the use of settling basins and thickeners. If any of such solids should find their way through respondents' sewers they would settle in respondents' slips and would not create shoals in the federal channel.[1] As indicated above, the Government's experts testified that the "worst offenders"

1. Government Exhibits 41, 41A, 42 and 42A (R. 2465-2468), show the amount of dredging done by the respective respondents in the areas adjacent to their slips. Government Exhibit 41A (R. 2466) shows that in 1951 Harvester dredged 18,860 cubic yards from the channel alone and a total of 39,107 cubic yards, including dredging from slips. Between 1945 and 1951, inclusive, Harvester dredged a total of 65,564 cubic yards from the channel alone. Since 1951 Harvester has dredged as follows (Government Exhibit 41A):

In Channel	16,137
In Wisconsin Slip	32,947
In Semet-Solvay Slip	10,682
	59,766 cubic yards.

From 1945 through 1955 Harvester has dredged from the channel a total of 81,701 cubic yards between Stations 126 to 146 and a total of 230,906 cubic yards, including material from the slips and between the slips and channel.

in respondents' sewer effluents are particles of flue dust smaller than a wave length of light and so small that they cannot be seen by the aid of an ordinary microscope. (R. 1300, 2190.)

In *Joint Committee of the River Ripple* v. *Halliwell*, 2 Q. B. 385 (1899), decided four months after the enactment of the 1899 Rivers and Harbors Act, the court had to decide whether wastes discharged into a river violated Section 2 of the Rivers Pollution Prevention Act of 1876. The court held that the matter, which consisted of 97.60% water and 2.4% solid matter, was not "putrid solid matter" within the meaning of that statute, but was liquid matter.

The correspondence "lodged" by petitioner with this Court does not purport to construe Section 13 as prohibiting effluent containing the tiny particles of flue dust in respondents' sewers. The correspondence primarily has to do with larger material. Thus the self serving letter of May 22, 1927 to Illinois Steel Co. (Pet. Br. p. 65) requests that the company install "a catch-basin placed in such a manner that it will catch the solids before they reach the mouth of the sewer." The letter of August 28, 1923 to Illinois Steel Co. requests the installation of settling basins. The record in this case establishes conclusively that respondents have installed settling basins and thickeners of such efficiency that the sewer effluent consists of 99.98% water.

The construction of Section 13 which petitioner urges upon this Court would emasculate the statute and would render illegal *every* storm, sanitary, and industrial sewer which discharges into a navigable waterway. Petitioner confuses the issue and misconceives the record in referring to fills and alterations to the channel. The issue is whether the effluent is in a "liquid state." It should be remembered that Professor Einstein indicated that most of the material

in respondents' sewers was of such a nature that if held up to the light in a glass, the liquid would seem clear. (R. 2191.)

The Government refers to *Sanitary District of Chicago* v. *Chicago Packing Co.*, 241 Ill. App. 288 (1st Dist., 1926). There the Sanitary District sought an injunction to restrain the Chicago Packing Co. from depositing "garbage, offal, flesh, bone, parts of dead animals and other liquid and solid matter" into the Chicago River, sewer and drainage canal. Demurrers were sustained by the trial court and the Appellate Court reversed. A holding that garbage, offal, flesh, bone and parts of dead animals are not sewage in the ordinary sense is a far cry from saying that the infinitesimal particles of flue dust discharged by these respondents are not "refuse matter other than that flowing from streets and sewers and passing therefrom in a liquid state." Moreover, it should be noted that that case did not turn on federal statute or on any federal question, but was an assertion by the State of Illinois through one of its agencies of its police power under the state law.

The Government also suggests that respondents' sewers are not "sewers" in the ordinary sense and infers that when Congress used the word "sewers" it did not mean all sewers but just some sewers. There is no statutory basis for such a distinction. Nothing in the ordinary usage of the word "sewer" suggests that Congress did not intend to include in the statutory exception respondents' sewers. One of the common definitions of the word "sewer" is: "Now, an artificial, usually subterranean, conduit to carry off water and certain waste matter, as * * * (3) waste water from industrial works." (Webster's New International Dictionary, 2d Ed. (1951).) The accepted definition of the word "sewage" is: "The contents of a sewer or drain; refuse liquids or *matter* carried off by sewers." (Webster's, *ibid.*)

It is a familiar rule of statutory construction that a statute should be construed in the light of the conditions existing at the time of its enactment and in the light of the meaning customarily ascribed to its terms.

As correctly pointed out by petitioner (Brief, p. 60), the language of Section 13 of the 1899 Act was first added to the statutes by Section 6 of the Act of August 18, 1894 (28 Stat. 338, 363). Section 6 of the 1894 Act provided in part:

> "That it shall not be lawful to place, discharge, or deposit, by any process or in any manner, ballast, refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any *other matter of any kind other than that flowing from streets, sewers, and passing therefrom in a liquid state*, in the waters of any harbor or river of the United States, for the improvement of which money has been appropriated by Congress, elsewhere than within the limits defined and permitted by the Secretary of War; * * *"

It should be noticed that in 1899, when Congress recodified earlier rivers and harbors legislation, it simply omitted from Section 13 the enumeration of specific items covered in Section 6 of the 1894 Act, such as "ballast, refuse, dirt" etc., and substituted therefor the broader term of "any refuse matter of any kind or description." The phrase "other than that flowing from streets, sewers, and passing therefrom in a liquid state" in the 1894 Act was carried forward *verbatim* into Section 13 of the 1899 Act.

Thus the liquid state exception should be construed in the light of conditions existing in 1894. It is common knowledge that in 1894 there were numerous iron and steel mills and other industries throughout the country which used vast quantities of water for industrial purposes and then returned the water to its source. For the purposes

of this case, the primary difference in the operations which were carried on in 1894 by such industries and those carried on today is that with technological improvements industry has learned to remove most of the industrial solids from the water before it is returned to the navigable waterways. Thus the thickeners used by these respondents remove 98% of the industrial solids from the water passing through them before it is returned to the Calumet River. (R. 1160.)

The liquid state exception in the Act of 1894 and the Act of 1899 was clearly intended to permit a continuation of industrial processes then commonly in use. An intent to forbid industry from making such a use of water should not be lightly ascribed to Congress in 1894. Any such intent on the part of Congress would have been so injurious to industry that it would have created a national debate which surely would have been reflected in the legislative history of the 1894 and 1899 statutes. This history, so laboriously quoted in the Government's brief, does not indicate the remotest intention on the part of Congress to effect such a revolutionary change in industrial techniques.

Section 13 (and also Section 10) of the 1899 Act (33 U. S. C., §§ 407 and 403) should likewise be construed in the light of the sewage disposal techniques generally practiced at that time. As correctly pointed out by the 7th Circuit, in 1900, out of a total urban population of more than 30,000,000, the aggregate urban population which provided any degree of treatment for its domestic and trade wastes was only 1,000,000. (*Modern Sewage Disposal*, 1938, p. 13, *Table 1*, published by the Federation of Sewage and Disposal Associations, Langdon Pearse, Editor, 50th Anniversary Book, Lancester Press, Inc.)

In an attempt to meet this argument, petitioner (Br. p.

34) refers to a 1913 report (H. Doc. No. 327) to indicate that the District Engineer thought the Sanitary District should dredge the Sag Channel. There is nothing in the record of this case to indicate whether the Sanitary District does or does not dredge. It is not surprising that the Army Engineers should attempt to shift responsibility for dredging to local government and private industry. The fact that they have attempted to do so, with occasional success, should not determine the proper construction of the statute and the rights of the parties to this litigation.

The statement in the 1926 report concerning pollution of navigable waters (Br. p. 36) that "as a rule such dredging is well attended to by municipal authorities" is hardly evidence of what municipalities in fact do nor the reasons which motivate them. There might be any number of reasons apart from any question of federal law why a municipality might dredge. The letter from Illinois Steel (now U. S. Steel) which petitioner cites dehors the record (Br. p. 26) indicates that that company dredges every year in order to make it possible to bring the ore boats to the docks. This is hardly competent evidence that Congress in 1899 intended to place the burden of maintaining practically the entire stretch of the Calumet River upon the three respondents here, not including U. S. Steel (see Finding 34, R. 105). The legislative and administrative "history" cited by petitioner demonstrates nothing more than a policy of the Army Engineers to have industry dredge if it will. The fact that these respondents in the past demonstrated a genuine desire to cooperate in the maintenance of the Calumet by dredging reasonable stretches of the channel should not impose upon them the legal obligation of permanently maintaining practically a four-mile stretch of the channel. This is what the Army Engineers seek.

Petitioner refers to the Oil Pollution Act of 1924. Its

only possible relevance is to prove conclusively that in 1924 Congress recognized that the Rivers and Harbors Act of 1899 did not answer every question concerning navigable waters.

Congress' interpretation of the 1899 Act is indicated by the Ohio River Valley Water Sanitation Compact, which was consented to and approved by Congress by the Act of July 11, 1940 (54 Stat. 752). The compact was held constitutional by this Court in *Dyer* v. *Sims*, 341 U. S. 22 (1951). This Court there quoted from and paraphrased Article VI of the Compact as follows (341 U. S. at p. 24):

> "'The heart of the Compact is Article VI. This provides that sewage discharged into boundary streams or streams flowing from one State into another 'shall be so treated, within a time reasonable for the construction of the necessary works, as to provide for substantially complete removal of settleable solids, and the removal of not less than forty-five per cent. (45%) of the total suspended solids; provided that, in order to protect the public health or to preserve the waters for other legitimate purposes, * * * in specific instances such higher degree of treatment shall be used as may be determined to be necessary by the Commission after investigation, due notice and hearing.' Industrial wastes are to be treated 'to such degree as may be determined to be necessary by the Commission after investigation, due notice and hearing.' Sewage and industrial wastes discharged into streams located wholly within one State are to be treated 'to that extent, if any, which may be necessary to maintain such waters in a sanitary and satisfactory condition at least equal to the condition of the waters of the interstate stream immediately above the confluence'."

The Compact, of course, pertains to water pollution while this case involves alleged obstructions to naviga-

tion. But we think it would be quite surprising for Congress in 1940 to approve a Compact authorizing the discharge into the Ohio River system of industrial wastes from which not less than 45% of suspended solids had been removed, if Congress had intended in 1899 to ban sewer discharges from which 98% of the suspended solids had been removed and which contained an aggregate of perhaps 2/100 of 1% solids. It would be particularly surprising if, as petitioner urges, the discharge of *any* suspended solids into navigable waters is unlawful under the 1899 Act.

In its approval of the compact pertaining to the Ohio River and its approval of other interstate compacts[1] pertaining to the pollution of water, Congress has authorized the deposit of industrial solids in suspension into some navigable waters. While Harvester concedes that Congress has almost unlimited power to legislate concerning navigable waters, we think it highly improbable that Congress would have approved the interstate compacts and their authorization for the discharge of industrial solids into the important national waterways subject thereto if Congress at the same time believed that the 1899 Act forbade the discharge of any solids into all other navigable waterways. Thus, in its approval of the compacts Congress has construed the 1899 Act as not forbidding the discharge through sewers of all industrial solids into navigable waters.

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1. See The New York Harbor Tri-State Interstate Sanitation Compact of 1935, consented to and approved by joint resolution of August 27, 1935 (49 Stat. 932); The Potomac River Basin Compact of 1939, consented to and approved by join resolution of August 31, 1937 (50 Stat. 884) and joint resolution of July 11, 1940 (54 Stat. 748); and New England Water Pollution Control Compact of 1947, negotiations for which were authorized by joint resolution of June 8, 1937 (49 Stat. 1490), and which was consented to and approved by the Act of July 31, 1947 (61 Stat. 682). The compacts are discussed in "Documents on the Use and Control of the Waters of Interstate and International Streams", United States Department of the Interior, 1956.

B. In Reference to Respondents' Sewers, the Specific Language in Section 13 Controls Over the General Language in Section 10 of the Rivers and Harbors Act of 1899.

Section 13 of the Act of 1899 specifically forbids the discharge or deposit of "any refuse matter of any kind or description whatever" into any navigable water. It specifically exempts from the ban "any refuse matter * * * flowing from streets and sewers and passing therefrom in a liquid state."

This specific exception governs as against the contention that the general language in Section 10 forbidding obstructions to navigation might be deemed to apply.

It is a familiar rule of statutory construction that specific language in a statute prevails over general language.

Thus, this Court in *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U. S. 222 (1957), had before it the question whether the word "resides" in a special venue provision for patent infringement excluded the broader definition of "resides" found in the general federal jurisdiction venue section. In holding that the special provisions govern, this Court there said (at pp. 228 and 229):

> "* * * In these circumstances the law is settled that 'However inclusive may be the general language of a statute, it "will not be held to apply to a matter specifically dealt with in another part of the same enactment * * *. *Specific terms prevail over the general in the same or another statute which otherwise might be controlling.*' *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208'." *MacEvoy Co.* v. *United States*, 322 U. S. 102, 107." (Italics added.)

See also the Court's earlier holding in *United States* v. *Chase*, 135 U. S. 255, 260 (1890), where this Court said:

> "It is an old and familiar rule that 'where there is,

in the same statute, a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment.' *Pretty v. Solly*, 26 Beavan, 610, per Romilly, M. R.; *State* v. *Comm'rs. of Railroad Taxation*, 37 N. J. Law, 228. This rule applies wherever an act contains general provisions and also special ones upon a subject, which, standing alone, the general provisions would include. Endlich on the Interpretation of Statutes, 560."

The legislative history of the Rivers and Harbors Act of 1899 shows that the discharge or deposit of wastes in navigable waters is governed by Section 13 (33 U. S. C. § 407) and that Section 10 of the Act (33 U. S. C. § 403) was not intended to render unlawful discharges of waste expressly permitted by Section 13.

The starting point is the Rivers and Harbors Act of 1890, the first general legislation which dealt comprehensively with the use of navigable waters for purposes other than navigation. Although the substantive provisions of the 1890 statute were rearranged in the 1899 Act, which also incorporated provisions enacted from time to time between 1890 and 1899, the 1890 Act was plainly the predecessor of the 1899 Act. Sections 10-20 of the 1899 Act deal in general with the same subject matter as Sections 6-12 of the earlier 1890 Act.

Each of Sections 6 to 9 of the 1890 Act dealt comprehensively with a particular kind of activity which might adversely affect navigation. Section 6 (printed in the Appendix to this brief) dealt comprehensively with the subject of the discharge or deposit of wastes. It provided: (1) that it should be unlawful "to cast, throw, empty or unlade * * * either from or out of any ship * * * or from the shore * * *

manufacturing establishments, or mills of any kind whatever, any ballast, stone * * * or other waste of any kind, into any * * * navigable waters of the United States *which shall tend to impede or obstruct navigation*"; and (2) that it should be unlawful to deposit waste of any kind on a bank where the waste would be liable to be washed into a navigable water so as to impede or obstruct navigation.

Section 10 of the 1890 Act contained a general provision that "the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited", and provided remedies for the violation of each of the preceding sections of the Act. This provision dealt generally with obstructions, while Section 6 dealt specifically with obstructions resulting from the discharge or deposit of waste.

A reading of the 1890 Act as a whole makes it apparent that the first sentence of section 10, which stated that unauthorized obstructions are prohibited, was intended to prohibit obstructions which resulted from the prohibited activities dealt with specifically in the other sections and also conceivably to operate as a catch-all prohibition of obstructions resulting from activities which were not dealt with in the other sections. Certainly the general language in section 10 was not intended as a substantive provision which would vary the legal effect of the discharge or deposit of waste, a subject dealt with comprehensively and specifically in section 6. "General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment." *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208; *Fourco Glass Co.* v. *Transmira Products Corp.*, 353 U. S. 222, 228-9 (1957); *U. S.* v. *Chase*, 135 U. S. 255, 260 (1890). If Congress had intended that the general provision in section 10 should govern the activities speci-

fically covered by section 6, the provision in section 6 which authorized certain deposits of waste would not have been a defense to a charge of obstruction under section 10 and section 6 would have been in part ineffective. Cf. *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 439 *et seq.* (1907). At the very least, then, section 10 clearly was not intended to prohibit activities specifically authorized by section 6 and by other sections of the Act.

In 1894, Congress included in the Rivers and Harbors Act of that year a section (section 6) which modified the law with respect to various activities covered by the 1890 Act. The first clause of section 6 of the 1894 Act modified the law with respect to the deposit of waste in navigable waters. It provided that "it shall not be lawful to place, discharge or deposit, by any process * * * ballast, refuse * * * or any other matter of any kind other than that flowing from streets, sewers and passing therefrom in a liquid state, in the waters of any harbor or river of the United States, for the improvement of which money has been appropriated by Congress, elsewhere than within the limits defined and permitted by the Secretary of War".

The provision in section 6 of the 1894 Act dealt with precisely the same subject matter as the first clause of section 6 of the 1890 statute, viz., the discharge or deposit of wastes in navigable waters. The 1894 Act effected two changes in the law dealing with the discharge or deposit of wastes. First, the prohibition of discharges was broadened by eliminating the requirement that a discharge "shall tend to impede or obstruct navigation" in order to constitute a violation. Second, waste material "flowing from streets and sewers and passing therefrom in liquid state" was exempted entirely from the prohibition of the law.

Congress did not in 1894, when it enacted the new provision governing the discharge and deposit of wastes, expressly amend or repeal the first clause of section 6 of

the 1890 Act, which dealt with the same activities. After the enactment of the 1894 provision, therefore, it might have been argued that the first clause of section 6 of the 1890 Act remained in effect and that discharges of waste through sewers, although exempted from the prohibition of the 1894 provision, would nevertheless be unlawful under section 6 of the 1890 Act if they violated the terms of the latter (*i.e.*, if the discharges tended to "impede or obstruct navigation"). Two facts, however, demonstrate convincingly that Congress intended that the 1894 provision was to supersede the first clause of section 6 of the 1890 Act and that the subject of the lawfulness or unlawfulness of the discharge or deposit of wastes in navigable waters was to be governed exclusively by the 1894 provision.

First. Shortly after the passage of the 1894 Act the Secretary of War asked the Attorney General what legal remedy, if any, was available with respect to a sandbar which was created in a river by discharges from a storm sewer. The sandbar obstructed navigation. The Attorney General, in 1894 (21 Op. O. G. 594-595) advised as follows:

> "It appears from your statement that this sewer drains about one-half of the town and receives the storm waters from several streets, and that there is a bar of very hard, fine sand in Flushing Creek opposite the mouth of the sewer extending nearly halfway across the creek and thereby offering obstruction to navigation; * * * you request my opinion whether this case comes within the exception provided in section 6 of the act of August 17, 1894. (28 Stat., 363.)
>
> "The said section provides, among other things, as follows: 'That it shall not be lawful to place, discharge, or deposit, by any process or in any manner, ballast, refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any other matter of any kind other than that flowing from streets, sewers, and passing therefrom in a liquid state, in the waters of any harbor

or river of the United States, for the improvement of which money has been appropriated by Congress, elsewhere than within the limits defined and permitted by the Secretary of War.'

"It is evident that before the legal questions arising can be properly considered by me certain questions of fact should be determined or agreed upon, viz: Whether or not the bar complained of is formed by discharge from the sewer, which, so far as appears, is left to inference; and whether the sand or other material is discharged merely in suspension and is then deposited upon the bar by the ordinary prompt action of gravity, or passes out in solution and is then precipitated. The facts on these points are necessary to determine the question whether the sand or sewage passes from the sewer in a liquid state within the meaning of the above act.

"As I am precluded from answering questions of fact or from considering questions of fact on evidence submitted, I am obliged to decline at present to answer your question."

Thus the Attorney General, although he declined to answer the question specifically because of the questions of fact involved, clearly indicated that the creation of the *obstruction* by the discharge of waste through the sewer would not be unlawful if the material discharged was in a "liquid state" within the meaning of the 1894 provision. In short, he considered the subject of the discharge of waste through sewers to be governed exclusively by the 1894 provision. He also advised that, assuming the obstruction was actually caused by the discharge of the material, the answer to the question whether or not the discharge was unlawful depended on whether the material discharged "is * * * deposited * * * by the ordinary prompt action of gravity," or "passes out in solution and is then precipitated."[1]

1. The Attorney General obviously recognized that a chemical definition of the phrase "liquid state" could not be given to the words as used by Congress without rendering them meaningless.

Second. When Congress enacted the 1899 statute to codify and revise the then existing general legislation governing the use of navigable waters for purposes other than navigation, Congress to a large extent simply re-enacted the provisions of the 1890 Act. To the extent that changes were made from the 1890 Act, those changes were obviously intentional.[1] Section 6 of the 1890 Act, which dealt with the discharge or deposit of wastes and the piling of refuse on shore, was re-enacted as section 13 of the 1899 Act, the only substantial change being that the 1894 provision governing the discharge of wastes was *substituted almost verbatim for the first clause of section 6 of the 1890 Act.* The second clause of section 6 of the 1890 Act was unchanged (with the exception of language changes), and continued to prohibit the deposit of waste matter on a bank where the matter would be liable to wash into navigable water so as to impede or obstruct navigation. Thus it is clear that Congress in 1899 intended that the 1894 provision governing the discharge of wastes should entirely supersede the similar provision in section 6 of the 1890 Act and that the lawfulness or unlawfulness of discharges of waste should be governed exclusively by the 1894 provision as incorporated in section 13 of the 1899

He concluded that material would not be in a "liquid state" if it was merely in such suspension that it would be deposited "by the ordinary prompt action of gravity" but that it would be in a "liquid state" if it passed out in solution and it was later precipitated. He thus gave to the words "liquid" and "solution" a perfectly acceptable scientific definition as well as a common sense interpretation. See the definitions of "liquid" and "solution" in Webster's New International Dictionary (2d Ed. 1951). The physical chemistry definition of a solution given is "The * * * process by which a substance, whether solid, liquid or gaseous, is homogeneously mixed with a liquid * * * A homogeneous mixture formed by the above process * * *"

1. As petitioner points out (Petitioner's brief, p. 53) the 1899 Act was intended to codify and revise existing general legislation. Furthermore, Congress took into consideration the opinions of the Attorneys-General. See the remarks of Senator Frye at 32 Cong. Rec., 2296-2297.

Act. In other words, Congress in 1899 either substantiated the Attorney General's interpretation of the 1894 provision or else intended, by the 1899 Act, to codify that interpretation. Had Congress intended in 1899 that the discharge of wastes from sewers should be unlawful despite the liquid state exception if the wastes impeded or obstructed navigation, it is inconceivable that Congress would not have so provided. Surely Congress would at the least have expressly limited the liquid state exception to discharges not obstructing navigation. But Congress did not do that.

The 1899 Act, considered as a whole, and independently of its history, is properly read as dealing with the subject of the discharge of wastes by section 13 exclusively under traditional rules of construction. In addition, the legislative and statutory history of the Act demonstrates beyond any reasonable doubt that this interpretation is correct and that the liquid state exception was intended to apply to all discharges of wastes falling within the terms of the exception.[1]

Petitioner's argument that the general provision in section 10 relating to the creation of obstructions should be read to apply to the effluent of Harvester's sewers ignores this statutory history. It should be remembered that the general obstruction provision of the 1890 Act, as indicated above, was obviously intended to apply to obstructions

1. The purpose of section 13 is to regulate the discharge and deposit of wastes so as to protect navigation against obstruction to the extent possible consistent with the recognition of certain requirements of municipalities and industry. It is interesting to note that the correspondence "lodged" with this Court by petitioner indicates that the Chief of Engineers, at any rate, considered that under section 13 a discharge of waste would be unlawful *only* if it in fact impeded or obstructed navigation. See the Senate Report set forth at pp. 69-71 of the petitioner's brief. If that interpretation of section 13 is sound, there is obviously no basis whatsoever for even arguing that the liquid state exception does not apply to discharges through sewers which may tend to impede navigation.

created by activities specifically covered in other sections of the 1890 Act only to the extent that such activities, including the discharge and deposit of wastes, were there prohibited. The same general provision was carried into section 10 of the 1899 Act, the only significant change being the substitution of the word "Congress" for the word "law," and should be construed accordingly.

The prohibition in section 10 of the 1899 Act, in the light of its history, was not intended to apply to obstructions resulting from activities specifically permitted by section 13, which deals comprehensively with the discharge and deposit of waste in navigable waters. Section 13 of the 1899 Act deals with *all* discharges and deposits of waste in navigable waters—discharges which tend to obstruct navigation as well as discharges which do not. Similarly, the exemption of waste flowing from streets and sewers in a liquid state applies generally. The exemption is as broad as the prohibition.

C. Whether or Not Section 13 Applies to Respondents' Sewers to the Exclusion of Section 10, Respondents Have Not Violated Section 10.

Section 10 of the Rivers and Harbors Act of March 3, 1899 (33 U. S. C. § 403) consists of one paragraph. For convenience in discussing its several provisions we have divided it as follows:

> 1. The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited;
>
> 2. and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of

Engineers and authorized by the Secretary of the Army;

3. and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

It is the position of this respondent that the small percentage of industrial wastes discharged through its sewers, particularly in view of the size of the particles does not constitute an obstruction within the meaning of Section 10. This court indicated in *Wisconsin* v. *Illinois*, 278 U. S. 367, 413 (1928) that the true intent of the Act of Congress was that unreasonable obstructions to navigation were to be prohibited.

It will be readily seen that the section deals with building or constructing objects which impede navigation. Thus the second clause forbids the building of any wharf, etc. "or other structures" "outside established harbor lines." Obviously Harvester's effluent is not a wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structure. See *United States* v. *Wilson*, 235 Fed. 2d 251, 253 (1956) (discussed below, page 48), where the 2nd Circuit Court held that a sunken barge was not a "structure".

Likewise the third clause of the section does not apply. It makes it unlawful "to excavate or fill or in any manner alter or modify, the course, location, condition or capacity of * * * any navigable water * * * unless *the work* has been recommended by the Chief of Engineers." The incidental silting from respondents' sewers could hardly be termed a "work" which could be recommended by the Chief of Engineers. The Government attributes unusual meaning

to ordinary language when it contends that Harvester has violated this clause of the section.

In *United States* v. *Brazoria County Drainage District No. 3*, 2 Fed. 2d 861 (S. D. Texas, 1925), the District constructed a drainage ditch without submitting its plans to the War Department for approval. The ditch was so constructed that a greater amount of washing and depositing occurred than was necessary. The United States filed a suit asking that the fill in the navigable stream be abated. Judge Hutcheson first said:

> "The government concedes that there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers, or which would sustain a bill in equity for abatement; that such obstructions and nuisances are offenses against the laws of states within which the navigable waters lie, but they are not offenses against United States laws, unless such laws are found on its statute books." 2 F. 2d at page 861.

In concluding that there was no violation of Section 10 he stated:

> "That these statutes prohibit the erection of structures in navigable streams, unless the plans therefor have been approved by the War Department, and authorize the removal of such structures placed without such approval, is plain. That they do not apply to washing or erosion caused by drainage, and that the prohibitory features of the statutes cannot be distorted so as to cover the operations of drainage districts, is equally plain. If this is the correct construction of the statutes, it follows that there was no duty upon the Brazoria county drainage district to present its drainage plans to the War Department before they put them into operation, and that, such duty being absent, the government cannot enjoin the operation of the district for failure to make such submission." 2 F. 2d at page 862.

United States v. *Burns*, 54 Fed. 351 (D. W. Va. 1893) was decided under the similar clause of the 1890 statute. The alleged violation was the throwing and placing of rafts, logs, sticks and boats in navigable waters in violation of Section 10 of the Rivers and Harbors Act of 1890. In sustaining a motion to quash an indictment based on that section and in holding the section inapplicable, the court said:

> "I think that the obstructions contemplated by the tenth section—those that have not been affirmatively authorized by law, and are therefore prohibited—are such obstructions as are permanent in their nature, as are created for special purposes, by the usual modes of construction." 54 Fed. 363.

In *United States* v. *Bigan*, 170 Fed. Supp. 219 (W. D. Pa. 1959), defendant while engaged in the business of stripping coal on a hill adjacent to the Allegheny deposited some material on the embankment in such a way that it fell into the river. The United States brought an action for prohibitory and mandatory injunctions based on Sections 9, 10, 12, and 13 of the Rivers and Harbors Act of 1899. The District Court held that the Government was not entitled to equitable relief. Distinguishing the opinion of the District Court in the instant case the court there held that there had been no violation of Section 10, and said:

> "This section is penal and should be strictly construed. It implies an intentional act as distinguished from a negligent or careless act to create an obstruction or to alter or modify the condition or capacity of the river." 170 Fed. Supp. 223.

These cases, while obviously not binding upon this Court, lend persuasive support to Harvester's contention that when Congress used the word "obstruction" in the first clause of Section 10, Congress meant objects or things which were built or constructed and did not mean to include the minute particles in the water from respondents' sewers.

Petitioner quotes voluminously (Br. pp. 53-64), from the legislative history of the 1899 Act. But we submit that none of the material so quoted has any bearing upon the question whether the flue dust flowing from respondents' sewers constitutes an obstruction within the meaning of Section 10.

The Sanitary District Litigation.

Petitioner relies heavily upon *Sanitary District* v. *United States*, 266 U. S. 405; and *Wisconsin* v. *Illinois*, 278 U. S. 367. Both involved the diversion of Lake Michigan water by the Chicago Sanitary District, and neither establish that these respondents violate Section 10 of the 1899 Act.

As is well known to this Court, the Sanitary District spent (and is still spending) vast sums of money to reverse the flow of the Chicago River and certain other waterways, including the Calumet. It did so by deepening or creating certain channels and by building or constructing an extensive system of locks and pumps, which constituted structures within the meaning of Section 10. The District thereby intentionally diverted quantities of water from the Great Lakes, thereby allegedly lowering the water level and damaging navigational, industrial and resort interests throughout the Great Lakes area in this country and in Canada.

Sanitary District v. *United States*, 266 U. S. 405 held that the diversion of Lake Michigan water by the Sanitary District constituted a violation of Section 10 of the Act of 1899[1] and that a further diversion should be enjoined unless the District obtained a permit from the Secretary of War containing conditions limiting the amount of water so diverted.

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1. Neither *Sanitary District* v. *United States*, 266 U. S. 405, nor *Wisconsin* v. *Illinois*, 278 U. S. 367, had occasion even to mention Section 13 of the 1899 Act, which specifically exempts from the prohibition against discharging refuse matter into navigable waters refuse matter "flowing from streets and sewers, and passing therefrom in a liquid state."

A fair reading of Mr. Justice Holmes' opinion would indicate, we believe, that that case involved different facts and different constitutional and statutory principles than those here involved. That case involved a direct conflict between the State of Illinois and its agencies and the United States. This Court there held that the United States had a paramount and sovereign interest in the Great Lakes, had a standing to sue to discharge its treaty obligations to Canada, and could resort to the courts to prevent the state from impinging upon the unfettered power of Congress over interstate commerce.

The distinction between that case and this becomes clear if one notes the recognition in that opinion of a theme concerning the interpretation of the commerce clause which runs through the opinions of this Court since its early days: this Court there pointed out that:

> "In matters where the States may act the action of Congress overrides what they have done. *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177. *Second Employers' Liability Cases*, 223 U. S. 1, 53. But in matters where the national importance is imminent and direct even where Congress has been silent the States may not act at all. *Kansas City Southern Ry. Co.* v. *Kaw Valley Drainage District*, 233 U. S. 75, 79. Evidence is sufficient, if evidence is necessary, to show that a withdrawal of water on the scale directed by the statute of Illinois threatens and will affect the level of the Lakes, and that is a matter which cannot be done without the consent of the United States, even were there no international covenant in the case." 266 U. S. at page 426.

This court thus held that even if Congress had not acted at all, and if there had been no treaty, the systematic diversion of Lake Michigan water by the District would constitute an invalid action by the state.

That is a far cry from petitioner's contention that the

less than .02 per cent of suspended solids in Harvester's sewer effluents violates the Act of 1899. This court held in *Cummings* v. *Chicago*, 188 U. S. 410, 427 (1902) that the Calumet is located entirely within the boundaries of Illinois (for the purposes of this case within Chicago) and that Illinois has plenary authority over it subject only to the constitutional exercise by Congress of its interstate commerce power. The *Sanitary District* case does not remotely indicate an intention to limit *Cummings* v. *Chicago*.

The *Sanitary District* case placed the water diversion problem with the Secretary of War. *Wisconsin* v. *Illinois*, 278 U. S. 367, 418-419 (1929) held that the Act of 1899 did not delegate to the Secretary of War power to permit diversion of lake water for purely sanitary purposes and that the diversion for such purposes would be enjoined, subject to the broad equitable principles there referred to. Thus *Wisconsin* v. *Illinois* removed the water diversion problem from the Secretary of War and placed it with this Court and the problem has remained here ever since. (See Original Docket Nos. 2-4.) As the 7th Circuit indicated, *Wisconsin* v. *Illinois* certainly represented a "retreat" from the *Sanitary District* case so far as it affected water diversion and we think also a retreat in principle. The language quoted in petitioner's brief (pp. 18, 19) so indicates.

Wisconsin v. *Illinois* illustrates the limited nature of the power delegated to the Secretary of War (now Secretary of the Army). It indicates that the Secretary has no jurisdiction over the contents of respondents' sewer effluents. As already demonstrated, the particles in respondents' effluent are not a "structure" which the Secretary could authorize under the second clause of Section 10. Nor can they constitute an excavation or fill or alteration of the channel, "*the work*" for which could be recommended by the Chief of Engineers under the third clause of Section 10. There-

fore, even if the material in the effluent were an obstruction, it would be one beyond the jurisdiction of the Secretary of the Army and one which only Congress could authorize under the first clause of the section.

But even petitioner does not make this contention and it seems clear that Congress did not intend in the 1899 Act to forbid flatly and unequivocally the discharge into navigable waters of industrial wastes carrying such small amounts of solids as the sewers here.

II. PETITIONER WAS NOT ENTITLED TO INJUNCTIVE RELIEF.

Obviously, if Harvester is correct in its assertion that it did not violate the 1899 statute, the Government is not entitled to an injunction. But even if there had been a violation, petitioner's right to an injunction is measured by the statute; and we submit that the statute, when read in the light of its history, denied petitioner injunctive relief in this case.

At the outset it should be noted that remedies for violation of Section 10 of the 1899 Act are set forth in Section 12 (33 U. S. C. § 406) (quoted in Pet. Br. pp. 47, 48). The latter section makes violation of the former a misdemeanor and provides penalties. It further contains the following specific provision concerning injunctions:

> "The removal of any *structures* or *parts of structures* erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States." (Italics added.)

Remedies for violations of 33 U. S. C. 407, Section 13 of the 1899 Act are covered by Section 16 of the 1899

Act (33 U. S. C. §§ 411 and 412, quoted in Pet. Br. pp. 49, 50). Section 13, it will be recalled, forbids the discharge or depositing of "refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state" into navigable waters. 33 U. S. C. 411 makes the violation of Section 13 a misdemeanor, but contains no provision whatever for an injunction.

Thus, 33 U. S. C. 411 does not provide an injunctive remedy for a violation of Section 13 and 33 U. S. C. 406 provides only a limited injunctive remedy to compel the removal of "structures or parts of structures" in violation of 33 U. S. C. 403, Section 10 of the 1899 Act.

As already indicated above, prior to the Rivers and Harbors legislation of 1890 there was no federal common law applicable to obstructions to navigation. *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1, 8-9 (1887), and cases there cited. See also *Cummings* v. *Chicago*, 188 U. S. 410, 427 (1902). The Rivers and Harbors Act of 1890, 26 Stat. 426, contained the first comprehensive legislation regulating obstructions to navigation. Section 10 of that statute (26 Stat. 454, Pet. Br. p. 46) prohibited "the creation of any obstruction not affirmatively authorized by law to the navigable capacity of any waters in which the United States has jurisdiction." It made the violation a misdemeanor and further provided that "the creating or continuing of any unlawful obstruction in this Act mentioned may be prevented and such obstruction may be caused to be removed by the injunction of any Circuit Court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney General of the United States."

Thus, Section 10 of the 1890 statute contained the broadest authorization for the granting of injunctions in a suit

by the United States in connection with obstructions to navigation. Section 6 of the 1890 statute, 26 Stat. 453 (our Appendix) made it "unlawful" to "cast, throw, empty, or unlade * * * any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, slag, cinders, ashes, refuse, or other wastes of any kind into any * * * navigable river * * * which shall tend to impede or obstruct navigation."[1]

The 1899 Act substantially revised the 1890 statute, as amended in 1894, and repealed all inconsistent provisions of the earlier Act. The 1899 Act omitted the broad grant of power to enjoin obstructions to navigation, and substituted for it a much narrower authorization to compel by injunction the removal of *structures* which obstruct navigation. The injunctive provisions of the 1899 Act are now found exclusively in 33 U. S. C. 406, referred to above, having been changed subsequently only in minor details, such as a substitution of "Secretary of the Army" for "Secretary of War."

Petitioner admits (Pet. Br. p. 57) that it has no explanation for the substitution of the word "structure" for the word "obstruction". Petitioner offers no explanation for the fact that Section 10 of the 1890 statute provided that "the creating or continuing of any unlawful obstruction in this Act mentioned may be prevented and such obstruction may be cause to be removed by" injunction (Pet. Br. p. 46), whereas Section 12 of the 1899 Act merely authorized "the removal of any *structures* or parts of structures erected in violation of the provisions of the said sections" by injunction.

The injunctive relief authorized by Section 12 of the 1899 statute is thus substantially narrower than that au-

1. As indicated above, Section 6 of the 1890 statute was amended in 1894 to except "matter of any kind * * * flowing from streets, sewers and passing therefrom in a liquid state" (Pet. Br. p. 60).

thorized by Section 10 of the 1890 Act. This change in language cannot have occurred through accident, particularly since the 1899 legislation was drafted in accordance with the 1896 direction of Congress to the Secretary of War to prepare a compilation of legislation pertaining to navigable waters "with such recommendations as to revision, emendation, or enlargement of the said laws as, in his judgment, would be advantageous to the public interest." (Section 2 of Act of June 3, 1896, as quoted in Pet. Br. p. 53.) The Rivers and Harbors legislation as so revised in 1899 manifests the unmistakable intention of Congress to limit the remedy of injunctions to those situations only with respect to which that remedy was affirmatively granted; namely, the removal of structures.

The omission from Section 12 of the 1899 Act of the broad grant of power to issue injunctions in connection with the removal of obstructions cannot be deemed an accident. As stated in *Wheeler* v. *Greene*, 280 U. S. 49, 51 (1929):

> "When so important a grant of power contained in the prototype is left out from the copy it is almost impossible to attribute the omission to anything but design, or to believe that it left to very attenuated implications what the model before it so clearly expressed."

Petitioner quotes (brief, pp. 20-25 and Appendix) exhaustively from the legislative history of the Rivers and Harbors Act of 1899, apparently with the intention of establishing that: (1) the 1890 Act is still in full force; and (2) Harvester is subject to an injunction under that act. We submit that petitioner failed to establish either contention.

The mere comparison of the 1899 legislation with the 1890 legislation as set forth in parallel columns commencing at

page 56 of petitioner's brief demonstrates that the latter must have been intended to supersede and repeal the earlier legislation. Congress surely would not have enacted Section 10 of the 1899 Act if Congress also intended persons affected thereby to refer to Sections 7 and 10 of the 1890 legislation.

The very title of the 1897 codification submitted by the Chief of Engineers (Pet. Br. p. 21)—an act "revising and Enlarging Laws for the Protection of Navigable Water" (H. Doc. No. 293, 54th Cong. 2d sess.)—suggests that the 1899 Act was intended to revise and supersede the earlier legislation.

Moreover Section 20 of the 1899 statute (printed Pet. Br. pp. 52, 53) specifically repealed "all laws or parts of laws inconsistent with the foregoing Sections 10 to 20," but it provided for survival of any causes of action which originated under the earlier legislation.[1]

As petitioner points out, one important change made in Section 10 of the 1899 Act was the substitution of "not affirmatively authorized by Congress" for "not affirmatively authorized by law". The change reversed the holding in *United States* v. *Bellingham Bay Boom Co.*, 176 U. S. 211, 215 (1900) that the phrase in the 1890 Act "meant not only a law of Congress, but a law of the State in which the river was situated." But this change certainly does not support petitioner's thesis that the 1899 statute did not supersede inconsistent provisions in the earlier Act pertaining to injunctions.

We submit that the legislative history of the 1899 statute demonstrates that the change in language in the injunctive provisions of Section 10 of the 1890 statute by Section 12

1. In addition it should be noted that 1 U. S. C. 204 provides that the matters contained in the U. S. Code shall "establish prima facia the laws of the United States." It should follow that an omission from the United States Code is prima facia evidence that the statute has been repealed.

of the 1899 statute was intentional and that Congress meant what it said when it limited the use of an injunction thereunder to "the removal of any structures or parts of structures."

We agree with petitioner that *Sanitary District* v. *United States*, 266 U. S. 405 cited *United States* v. *Bellingham Bay Boom Co.*, 176 U. S. 211, and *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690, on the assumption that they were still good law, but we fail to see the relevance. In each case there was a statute which authorized the relief granted. As petitioner itself points out in the language quoted from *United States* v. *Wishkah Boom Co.*, 136 Fed. 42, 45 (brief, p. 23) the repealer in Section 20 of the 1899 Act expressly provided "that no action begun or right of action accrued prior to the passage of this Act shall be affected by this repeal." The cause of action in the *Bellingham Bay Boom Co.*, and *Rio Grande Irrigation Co.* cases, as well as in *United States* v. *Wishkah Boom Co.* arose, under the 1890 statute. Even petitioner fails to intimate that its purported cause of action accrued prior to the effective date of the 1899 statute.

Petitioner criticizes the opinion of the Second Circuit in *U. S.* v. *Wilson*, 235 Fed. 2d 251 (1956). That case involved an action by the United States for a mandatory injunction to compel the defendants to remove a sunken barge from the Hudson. The suit was based on the Rivers and Harbors Acts of 1890 and 1899. The trial court held that the United States was not entitled to injunctive relief and the Second Circuit affirmed. In an opinion by Judge Hincks in which Judges Medina and Waterman concurred, the Court of Appeals first held that Section 10 of the Rivers and Harbors Act of 1890 was repealed by the 1899 Act. It said:

> "Section 20 of the later Act, in its final paragraph, 30 Stat. 1155, provided: 'That all laws or parts of

laws inconsistent with the foregoing sections ten to twenty, inclusive, of this Act are hereby repealed * * *.' See Historical Note under 33 U. S. C. A. § 415. Sections 10, 12, 15 and 19 of the Act of 1899 *were* inconsistent with § 10 of the 1890 Act." 235 Fed. 2d at page 252.

It next disposed of *United States* v. *Wishkah Boom Co.*, 136 Fed. 42 (C. A. 9th, 1905), upon which the Government relies. It said:

> "It was there said that § 10 of the 1890 Act, which prohibits both the creation and the continuance of an obstruction, is not inconsistent *with § 10 of the later Act*, which prohibits the creation of obstructions but not their continuance, and that therefore § 10 of the earlier Act does not fall within the scope of the repeal clause carried in § 20 of the later Act. We cannot agree with that holding. With deference, we think that the court overlooked the fact that the repeal clause covered prior laws which were inconsistent not merely with § 10 of the later Act but, rather, inconsistent with §§ 10 to 20, inclusive, of the later Act. As we have noted, if §§ 10, 12, 15 and 19 of the later Act be read together as they should be, they are inconsistent with § 10 of the earlier Act. By way of editorial comment to 33 U. S. C. A. § 403 it was stated that § 10 of the earlier Act 'was probably omitted from the Code [as indeed it was] as superseded by' § 10 of the 1899 Act. We hold that it was indeed repealed by § 20 of the 1899 Act." 235 F. 2d at pages 252, 253.

It further noted that the only injunctive provisions applicable to the removal of the sunken barge was Section 13 of the 1899 Act (33 U. S. C. § 406) and said that that section limited the injunctive power to "the removal of any structures or parts of structures erected in violation of the provisions of" Sections 9, 10 and 11 of the 1899 Act. It concluded:

> "Clearly, our sunken barge is not a structure prohibited by §§ 9 and 11 which were concerned with

bridges, dams, piers, wharves, etc. Nor, we hold, was it a 'structure' as denounced in § 10, 33 U. S. C. A. § 403. *In re Eastern Transportation Co.*, D. C., 102 F. Supp. 913. That section prohibits, first, 'The creation of any [unauthorized] obstruction * * * to the navigable capacity' of United States waters, and, second, the building of 'any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other *structures*' in any port, etc. (Emphasis supplied.) It thus makes a plain distinction between 'obstructions' and 'structures.' Section 12, 33 U. S. C. A. § 406, deliberately we think, restricts its injunctive power to 'structures' and thereby excluded from its injunctive scope the 'obstructions' denounced by § 10, 33 U. S. C. A. § 403." 235 F. 2d at p. 253.

In a footnote, the court also pointed out that the intimation in the *Wishkah Boom* case that the 1899 Act did not repeal the 1890 Act was dictum because the cause of action in the *Wishkah Boom* case accrued prior to the 1899 Act and was expressly saved by Section 20 thereof.

Petitioner argues that a dike created through the use of water power might be a structure banned by Section 10 and hence subject to an injunction. But that would be a different case. The application of any statute must depend upon the material facts. A dike is far removed from the deposits of fine material coming from respondents' sewers.

As already, demonstrated, *Sanitary District* v. *United States*, 266 U. S. 405, does not authorize the use of an injunction in this case. That case asserted the paramount sovereign interests of the United States in the Great Lakes and held that because of those interests and the national and international importance of the case, the diversion of lake water was unlawful and could be enjoined even in the absence of statute. That the *Sanitary District* case was not intended to overrule *Cummings*

v. *Chicago*, 128 U. S. 410, 427 (1903), is indicated by the fact that the latter case was cited with approval by *Wisconsin* v. *Illinois*, 278 U. S. 367, 412 (1929). The *Cummings* case held that in the absence of a federal statute, the State of Illinois had plenary power over the Calumet River and that the authority of the federal government over the river depended upon the terms of Congressional enactments.

In the *Sanitary District* case, Mr. Justice Holmes painted with a broad brush, but his opinion should be read in the light of the facts there involved. In that case the Court had before it an expensive system for reversing the flow of the Chicago River so as to prevent the pollution of Lake Michigan. The system included channels, locks, pumps, pipes and plants. These constituted structures within the meaning of Section 10 of the 1899 statute. They were constructed under conditional permits issued by the Secretary of War, which permits were changed from time to time to vary the amount of water diverted from the lake, 266 U. S. at pp. 429, 430. Under the clear language of Section 10 and Section 12 of the 1899 statute (and apart from other equitable considerations of great importance) the Court could have compelled the removal of all these structures by injunction.

In the light of these facts it seems clear that this Court did not there intend to hold that in every instance of a violation of the Rivers and Harbors Act of 1899 the United States could obtain an injunction notwithstanding the express language of that statute. Such a holding would deprive the 1899 revision of the remedial provisions now contained in Section 12 of any effect. The opinion in the *Sanitary District* case can be read in vain for any such holding.

The cases cited on page 42 of Plaintiff's brief are not in point. They either involve an area in which there were no specific statutory provisions pertaining to injunctive relief or statutes which specifically authorize injunctions. In the instant case Congress has legislated on the subject and the question, therefore, is, what does the statute provide? None of the cases cited involve or apply to the statute in question.

Thus *In re Debs*, 158 U. S. 564 (1895), sustained the power of the Attorney General in the absence of statute to obtain an injunction in the Pullman strike which was disrupting the delivery of United States mail, was crippling interstate commerce and was creating a national emergency. In our case shipping has not stopped, there is no emergency and there is a statute.

In *North Bloomfield Gravel Mining Co.* v. *United States*, 88 Fed. 664 (C. A. 9, 1898), there was no statute spelling out the use of an injunction in a suit by the government. The language quoted from *United States* v. *Ingram*, 203 F. 2d 91, 97 (C. A. 8, 1953), must be read in the light of the fact that the injunction there to restrain dismantling of a bridge was issued under "An Act to regulate the construction of bridges over navigable waters," 33 U. S. C. § 491 ff. The statute included a section specifically authorizing the Secretary of War to compel the removal of any "structures erected or maintained in violation of the provisions of this Act," 33 U. S. C. § 495. See 203 F. 2d at p. 95. In *Griffen* v. *United States*, 168 F. 2d 457 (C. A. 8, 1948), quoted in the *Ingram* case, there was no statute pertaining to the use of an injunction. In *Economy Light & Power Company* v. *United States*, 256 U. S. 113 (1921), similarly quoted, the injunction pertained to the construction of a dam over a navigable water in violation of Section 9 of the Act of 1899 (33 U. S. C. §401) and the dam was clearly a "structure" within the mean-

ing of Section 12 of that statute (33 U. S. C. § 406) and hence a proper subject of an injunction.

New York v. *New Jersey*, 256 U. S. 296 (1921), invoked the original jurisdiction of this Court in a suit brought by one state against another. The right of the United States to intervene recognized there has no bearing on the instant case. The right of private parties, damaged by illegal deposits, to equitable relief from a court of competent jurisdiction, as recognized in *Converse* v. *Portsmouth Cotton Oil Refining Corp.*, 208 Fed. 981 (C. A. 4, 1922), has no bearing on the right of the United States to obtain a mandatory and prohibitory injunction in this case. So far as one can ascertain from the opinion in that case, the relief granted there was not based on statute but upon common law principles. As demonstrated above, the rights and duties of the Executive Department of the United States in reference to the Calumet River are dependent upon statute.

In view of the specific language of Section 12 of the 1899 Act, Section 17 is immaterial. Petitioner in its amended complaint (R. 71, 72) and the trial court in its conclusions of law (R. 108) based the right of the government to injunctions squarely upon 33 U. S. C. 403, 407. Those sections and 33 U. S. C. 406 clearly limit the use of an injunction thereunder to the removal of structures.

III. PETITIONER PRESENTS NEW ISSUES OF LAW AND OFFERS NEW EVIDENCE IN THIS COURT. SUCH NEW MATTER SHOULD NOT BE CONSIDERED.

The Government as plaintiff in the District Court framed the issues. It was permitted to offer such evidence as it desired and was largely responsible for the five volume record. It secured the adoption of findings of fact, con-

clusions of law and a decree according to its theory of the case. Nevertheless petitioner presents a new theory of liability here for the first time and attaches to its brief documentary evidence dehors the record.

A. Petitioner Here for the First Time Prays Damages.

The prayers of the original (R. 9) and amended (R. 73) complaints were for injunctive relief only. Petitioner gave not the slightest intimation in the trial court nor in the Court of Appeals that it thought it was entitled to damages and makes the contention for the first time here. It did not request a rehearing in the Court of Appeals.

Petitioner cites FRCP 54 (c). That rule was not intended to change customary appellate procedure nor to abrogate the familiar rules that an appellate court will only review a case on the record and will not consider questions not presented to the court below. *Lawn* v. *United States*, 335 U. S. 339, 362 n. (1958).

A consideration of the record in this case will demonstrate that it would be unfair to award damages without a completely new trial. The suggestion that damages be awarded is an afterthought which should not be considered by this Court.

B. Petitioner Here for the First Time Invokes the 1890 Rivers and Harbors Legislation.

The complaint (R. 8), amended complaint (R. 72), and the trial court's conclusion of law (R. 108), based the petitioner's right to equitable relief specifically and exclusively upon 33 U. S. C. §§ 403, 407. The applicability of those sections to respondents' sewer effluents was the primary issue tendered to the Court of Appeals and decided adversely to petitioner. For the first time in the

case petitioner urges this Court that the 1890 statute is in force. It is submitted that this Court should not reverse the Court of Appeals on grounds not argued before it.

Moreover, as demonstrated above, the remedial provisions of the 1890 statute were clearly inconsistent with, and superseded by, the injunction provisions of the 1899 statute.

C. Petitioner Argues from Correspondence Dehors the Record.

Petitioner had ample time and opportunity to make whatever record it deemed proper in this case. Nevertheless it "lodged" a file of correspondence never offered in evidence with the Clerk of this Court and has made reference thereto in its brief. (Pet. Br. 64 ff.). None of this correspondence was ever published and none of it is of such a nature that this Court could properly take judicial notice of it.

Much of this "evidence" is correspondence between the Army Engineers and Illinois Steel Corporation, predecessor to United States Steel Corporation, and neither corporation is a party to this suit. Respondents were denied the opportunity of objection, of cross-examination, and of rebuttal. Petitioner has made no showing that the operations of United States Steel are factually or legally comparable to the operations of respondents. Respondents through the use of settling basins and thickeners remove almost all industrial solids from the sewer effluent so that the discharges flowing from respondents' sewers consist of 99.98% water. Petitioner does not indicate whether United States Steel does likewise. The letter from Illinois Steel (quoted Pet. Br. p. 26) indicates that that company was compelled to dredge at the mouth of the

Calumet River every year in order to be able to bring its ore boats to its docks.

It should not be necessary to cite authorities for the proposition that this Court "must look only to the certified record in deciding questions presented." *Lawn* v. *United States*, 355 U. S. 339, 354. This Court there also stated that "only in exceptional cases would this Court review a question not raised in the court below." (362 n.)

CONCLUSION.

It is respectfully submitted that there is no federal law or statute that supports the injunctions in this case; that the decision of the Court of Appeals was right and should be affirmed. In the alternative, if this Court does not affirm the Court of Appeals, it is respectfully submitted that the cause should be remanded to that court for consideration of those assignments of error not heretofore passed upon.

Respectfully submitted,

PETER A. DAMMANN,
DAVID G. MOYER,
WILLIAM S. BODMAN,
GEORGE W. THOMPSON,
120 West Adams Street,
Chicago 3, Illinois,
Attorneys for Respondent International Harvester Company.

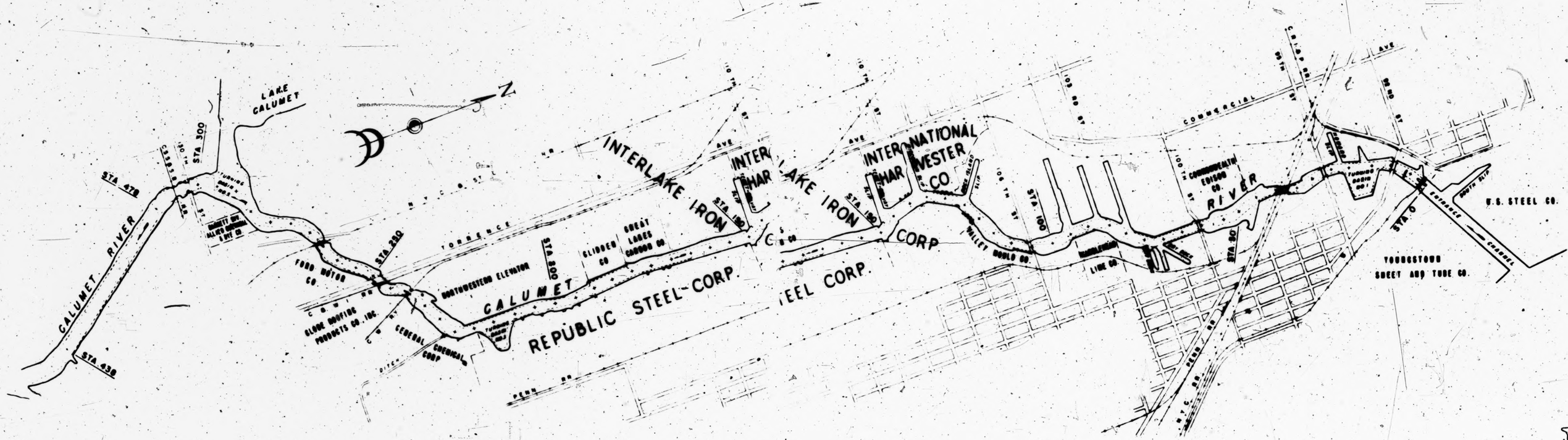
WILSON & McILVAINE,
120 West Adams Street,
Chicago 3, Illinois,
Of Counsel.

APPENDIX.

Section 6 of the Rivers and Harbors Act of September 19, 1890, 26 Stat. 426, 453, 454, provides:

> That it shall not be lawful to cast, throw, empty, or unlade, or cause, suffer, or procure to be cast, thrown, emptied, or unladen, either from or out of any ship, vessel, lighter, barge, boat, or other craft, or from the shore, pier, wharf, furnace, manufacturing establishments, or mills of any kind whatever, any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, slag, cinders, ashes, refuse, or other waste of any kind, into any port, road, roadstead, harbor, haven, navigable river, or navigable waters of the United States which shall tend to impede or obstruct navigation, or to deposit or place or cause, suffer, or procure to be deposited or placed, any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, or other waste in any place or situation on the bank of any navigable waters where the same shall be liable to be washed into such navigable waters, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided,* That nothing herein contained shall extend or be construed to extend to the casting out, unlading, or throwing out of any ship or vessel, lighter, barge, boat, or other craft, any stones, rocks, bricks, lime, or other materials used, or to be used, in or toward the building, repairing, or keeping in repair any quay, pier, wharf, weir, bridge, building, or other work lawfully erected or to be erected on the banks or sides of any port, harbor, haven, channel, or navigable river, or to the casting out, unlading, or depositing of any material excavated for the improvement of navigable waters into such places and in such manner as may be deemed by the United States officer supervising said improve-

ment most judicious and practicable and for the best interests of such improvements, or to prevent the depositing of any substance above mentioned under a permit from the Secretary of War, which he is hereby authorized to grant, in any place designated by him where navigation will not be obstructed thereby.


LAKE CALUMET
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STA 478
STA 438
STA 300
STA 250
STA 200
STA 150
STA 100
STA 50
STA 0
INTERLAKE IRON CORP
INTERNATIONAL HARVESTER CO
REPUBLIC STEEL CORP.
FORD MOTOR CO
GLIDDEN CO
GREAT LAKES CARBON CO
NORTHWESTERN ELEVATOR
CALUMET
GENERAL CHEMICAL CORP
VALLEY MOULD CO.
COMMONWEALTH EDISON CO.
RIVER
YOUNGSTOWN SHEET AND TUBE CO.
U.S. STEEL CO.
TORRENCE
COMMERCIAL
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LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 56

UNITED STATES OF AMERICA, *Petitioner*,

vs.

REPUBLIC STEEL CORPORATION, INTERNATIONAL HARVESTER COMPANY, AND INTERLAKE IRON CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

SUPPLEMENTAL APPENDIX TO BRIEF FOR REPUBLIC STEEL CORPORATION.

PAUL R. CONAGHAN,
208 South La Salle Street,
Chicago 4, Illinois,
H. C. LUMB,
Republic Building,
Cleveland 1, Ohio,
Attorneys for Republic Steel Corporation.

STEVENSON, CONAGHAN, HACKBERT,
ROOKS AND PITTS,
208 South La Salle Street,
Chicago 4, Illinois,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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"There is one matter affecting the harbor of New York which demands the most earnest attention of those who are concerned in its welfare, and that is the damage which is being done to it by dumping into it the dredgings of the docks and slips, and the ashes and cinders from steam vessels. Few people have any conception of the extent to which this mode of injury is carried on; yet the records of this office and of the office of the Commissioners of Pilots of the State of New York show that it is being done constantly, and in every part of the harbor and of the waters connected with it. In the operations and surveys conducted by this office, lumps and shoals formed in this way have been found in the Byram River, at the mouth of Newtown Creek, on the shoal at the head of Buttermilk Channel, and all over Raritan Bay; and information has been received that the practice prevails in all parts of the Hudson and East rivers.

"In the recent deepening of Newtown Creek, which empties into the East River opposite Thirty-fourth street, New York, and which is crowded with shipping, one-third of the appropriation had to be applied to the removal of marsh sod and rubbish which had been dumped in this way in the very mouth of the creek; and, as a consequence, the deepening of the channel for a quarter of a mile above the Vernon Avenue bridge, which had been intended, had to be left undone.

"All of these places are in course of improvement by the United States, and the effect of this indiscriminate dumping is to damage the harbor, obstruct navigation, and increase the cost of the improvement to the United States; and yet, strange as it may appear, there is no law of the United States under which this mischievous practice can be

stopped or the perpetrators of it punished. All contracts with the United States Government for dredging in New York Harbor are so drawn as to require that the dredged material shall be dumped in deep water outside of Sandy Hook; but it is doubtful if much of the material dredged under private contracts is ever dumped anywhere but inside. It is certain that none of the material dredged from the neighboring waters

along the New Jersey shore is ever taken out to sea. It is dumped in Newark Bay, the Kills, and Raritan Bay chiefly. New Jersey has, I believe, no law relating to the subject. New York has such a law, establishing a dumping ground off Coney Island, enacting penalties for dumping ashes, refuse, or dredgings anywhere else, and providing for the appointment of a shore commissioner whose duty it is to see that the law is complied with and to prosecute all infractors of it. But although judgments in these cases are sometimes obtained, they are usually either impossible of collection or so small in amount that they do not deter the perpetrators from dumping where they please and taking the chances of being caught. Moreover it is very seldom that any legal proof of these violations of the law can be obtained, for as a rule the dredging is done by day and the dumping is done at night, and, except by accident, no one but the captain and men of the tug and scows know where the dumping is done, for the waters of the harbor are so extensive and have so many branches and outlets, and so many dredges and scows are engaged in the business, that it is impossible to watch them all or in all parts of their journeys to the dumping ground, and if any suspicion is entertained that they are being watched, and it is difficult to set a watch that will not be detected since the customs and practice of the tug service are known and

any deviation from them is at once observed, it is only necessary that the scows should continue their journey to the dumping ground and the watch fails of its purpose.

"The New York law is a step in the right direction, but it is inadequate to the end desired, and even if it were possible to make it entirely efficient in New York waters, it would be of no avail in the adjoining waters of New Jersey, and there the dumpings would go on in Raritan Bay and the Kills as heretofore.

"The Board of Commissioners of Pilots of the Port of New York have done everything in their power to remedy this evil, and some years ago prepared a bill for the purpose, which, besides establishing penalties for dumping at any but the authorized places, provided for taking away the license of the tug captain or pilot who should permit it; but the bill was never enacted.

"A penalty of this kind seems to be very necessary, for one of the difficulties in the way of the execution of the present law is to show that the owner, who is to pay the penalty, is responsible for the act of the captain of his tug. No tug captain will probably disregard the unexpressed though understood wishes of his owner when the penalty of doing so is the loss of his position, unless the greater penalty of losing his license were incurred by complying with that wish.

"The river and harbor bill of August 6, 1886, declared it to be unlawful to dump dredgings and other materials into the waters of New York Harbor, but as no penalty was attached to the offense the law is without effect.

"The bill, as 'committed to the Committee of the Whole House on the state of the Union and ordered to be printed,' extended this prohibition against dumping to all the navigable waters of the United States, and for this and other

damages to those waters provided the following penalties and method of enforcing them:

'SEC. 6. Every person, persons, or corporation offending against the provisions of this act, shall, for each and every such offense, forfeit and pay a penalty of $250 (one-half, on conviction of the offender, to be paid to the informer), besides such further sum as may be found, in any action for the recovery of the penalty or penalties incurred under this act, to be the expense of making good the damage incurred, or of removing to a proper place the things deposited in violation of this act, such penalties to be recoverable, by and in the name of the United States of America, with costs,

in any circuit or district court of the United States, at the suit of any district attorney of the United States, or at the suit of any person, by information to any district attorney in any district where, or near to where the offense shall have been committed or the offender shall be.

SEC. 7. It shall be the duty of the officers and agents having the supervision, on the part of the United States, of the works in progress for the preservation and improvement of said navigable waters, and in their absence of the United States collector of customs and other revenue officers, to enforce the provisions of this law by giving information to the district attorney of the United States nearest to the place where any violation of any provision of this act shall have been committed.'

"But these provisions were unfortunately stricken out before the act was passed.

"Some measure of this kind is absolutely necessary for the preservation against wanton damage of the navigable waters of the United States, and most especially of the harbor of New York and its tributaries.

"It is evident, from the nature of the case, from the great extent of waters involved, the many dredges and scows employed and the time chosen for dumping, and the innumerable steam-boats, steam-ships, and steam-tugs constantly passing to and fro, that it is wholly impossible to put an end to this injurious practice by the use of any organized force. The only remedy seems to be that which was provided by section 6, quoted above, namely: 'The

infliction of a fine, one half to go to the informer upon conviction of the offender, and the recovery of damages for the mischief done.' That this would be effectual there can be no doubt, since it would put a large part of our water population on the watch, would make detection almost certain, and by rendering a violation of the law unprofitable, would take away the incentive to it which now exists."

• • • • •

50TH CONGRESS, 2d Session. } HOUSE OF REPRESENTATIVES. Ex. Doc. 1, pt. 2, vol. II.

"ANNUAL REPORT OF THE CHIEF OF ENGINEERS, UNITED STATES ARMY, TO THE SECRETARY OF WAR, FOR THE YEAR 1888.

In Four Parts.

Part I.

Washington:

Government Printing Office.

1888."

APPENDIX E—REPORT OF LIEUT. COL. MCFARLAND. 621

* * * * *

"The illegal dumping of refuse and dredged material spoken of in my last annual report has continued throughout the year, greatly to the detriment of the harbor, and at considerable loss to the Government, which in several instances has been obliged to dredge up and remove the material dumped in the channels.

It is hoped, however, that this vicious practice will be entirely done away with under the provisions of Senate bill No. 1241, which received the approval of the President June 29. This bill, a copy of which is annexed, contains the best provisions of the bill recommended by the Board of Commissioners of Pilots, referred to in my last annual report, since it provides for the fine or imprisonment, or both,

of any one aiding or abetting such illegal dumping, half the fine to go to the informer, the taking away of the license of the master or engineer who may engage in it, the libelling of any vessel employed in such work, and lastly fining the owners of the property from which such material is taken as well as the owner of the dredge who does the work, at the rate of $5 for each and every cubic yard of material illegally dumped.

"This act applies only to New York Harbor and the waters connected with it. It would be in the interests of navigation and of economy if its provisions were extended to all the navigable waters of the United States which are subject to improvement."

* * * * * *

* * * * * *

"PUBLIC—No. 155.

"AN ACT to prevent obstructive and injurious deposits within the harbor and adjacent waters of New York City, by dumping or otherwise, and to punish and prevent such offenses.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the placing, discharging, or depositing, by any process or in any manner, of refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any other matter of any kind, other than that flowing from streets, sewers, and passing therefrom in a liquid state, in the tidal waters of the harbor of New York, or its adjacent or tributary waters, or in those of Long Island Sound, within the limits which shall be prescribed by the supervisor of the harbor, is hereby strictly forbidden, and every such act is made a misdemeanor, and every person engaged in or who

shall aid, abet, authorize, or instigate a violation of this section, shall, upon conviction, be punishable by fine or imprisonment, or both, such fine to be not less than two hundred and fifty dollars nor more than two thousand five hundred dollars, and the imprisonment to be not less than thirty days nor more than one year, either or both united, as the judge before whom conviction is obtained shall decide, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction of this misdemeanor.

"SEC. 2. That any and every master, and engineer, or person or persons acting in such capacity, respectively, on board of any boat or vessel, who shall knowingly engage in towing any scow, boat, or vessel loaded with any such prohibited matter to any point or place of deposit, or discharge in the waters of the harbor of New York, or in its adjacent, or tributary waters, or in those of Long Island Sound, or to any point or place elsewhere than within the limits defined and permitted by the supervisor of the harbor hereinafter mentioned, shall be deemed guilty of a violation of this act, and shall, upon conviction, be punishable as hereinbefore provided for offenses in violation of section 1 of this act, and shall also have his license revoked or suspended for a term to be fixed by the judge before whom tried and convicted.

"SEC. 3. That in all cases of receiving on board of any scows or boats such forbidden matter or substance as herein described, it shall be the duty of the owner or master, or

person acting in such capacity, on board of such scows or boats, before proceeding to take or tow the same to the place of deposit, to apply for and obtain from the supervisor of the harbor appointed hereunder a permit defining the precise limits within which the discharge of such scows

or boats may be made; and any deviation from such dumping or discharging place specified in such permit shall be a misdemeanor within the meaning of this act; and the master and engineer, or person or persons acting in such capacity, on board of any tow-boat, towing such scows or boats, shall be equally guilty of such offense with the master or person acting in the capacity of master of the scow, and be liable to equal punishment.

"SEC. 4. That all mud, dirt, sand, dredgings, and material of every kind and description whatever taken, dredged, or excavated from any slip, basin, or shoal in the harbor of New York, or the waters adjacent or tributary thereto, and placed on any boat, scow, or vessel for the purpose of being taken or towed upon the waters of the harbor of New York to a place of deposit, shall be deposited and discharged at such place or within such limits as shall be defined and specified by the supervisor of the harbor, as in the third section of this act prescribed, and not otherwise. Every person, firm, or corporation being the owner of any slip, basin, or shoal, from which such mud, dirt, sand, dredgings, and material shall be taken, dredged, or excavated, and every person, firm, or corporation in any manner engaged in the work of dredging or excavating any such slip, basin, or shoal, or of removing such mud, dirt, sand, or dredgings therefrom, shall severally be responsible for the deposit and discharge of all such mud, dirt, sand, or dredgings at such place or within such limits so defined and prescribed by said supervisor of the harbor; and for every violation of the provisions of this section the person offending shall be guilty of an offense against this act, and shall be punished by a fine equal to the sum of five dollars for every cubic yard of mud, dirt, sand, dredgings, or material not deposited or discharged as required by this section. Any boat or vessel used or employed in violating any provision of this act, shall be liable to the pecuniary penalties imposed

thereby, and may be proceeded against, summarily by way of libel in any district court of the United States, having jurisdiction thereof.

"SEC. 5. That a line officer of the Navy shall be designated by the President of the United States as supervisor of the harbor, to act under the direction of the Secretary of War in enforcing the provisions of this act, and in detecting offenders against the same. This officer shall receive the sea-pay of his grade, and shall have personal charge and supervision under the Secretary of War, and shall direct the patrol boats and other means to detect and bring to punishment offenders against the provisions of this act.

"SEC. 6. That the sum of thirty thousand dollars, or so much thereof as may be necessary, is hereby appropriated to carry out the provisions of this act; and the Secretary of the Treasury is hereby authorized to pay that sum from moneys in the Treasury not otherwise appropriated.

Approved, June 29, 1888."

* * * * * *

New York Senate Document No. 6, vol. 1, 1877, "Report of the Board of Commissioners of Pilots for the Year 1876" (Jan. 9, 1877):

> "The disposal of sweepings and garbage from the streets has become a question of magnitude and gravity, no place being found for the material on shore or for filling in, as the sanitary authorities refuse permission, fearing injury to the health of the cities. Large quantities have, during the past year, been deposited just outside the harbor limits (under the pressure of necessity, as claimed) by the street cleaning department, to the injury of the channels and of the much frequented shores of Coney Island, the popular watering place for the City of Brooklyn.

"This board has urged upon the city authorities the necessity of making permanent provisions for wasting this material at sea by the construction of steam hopper scows of large capacity * * * and thus dispose of this troublesome material without injuriously affecting the channel-ways or shores; * * *

* * * * * *

"The board respectfully requests that chapter 414, 1875 be amended to include within its provisions all refuse materials from the streets of the cities, and that its prohibition be extended to three miles outside the bar, * * *."

New York Assembly Document No. 11, vol. 2, 1878, "Report of the Board of Commissioners of Pilots for the Year 1877" (Jan. 9, 1878):

"The deposit of the city's refuse material in the harbor has continued to be a source of much anxiety and trouble, and great damage has been done to the navigable waters of the ports. The board recommends the imposition of a severe penalty of imprisonment upon the master of the steamboat engaged in towing any scow or scows which shall be proven to have discharged contrary to law.

"The board also recommended that chapter 414, 1876 be amended so as to require dredgings and other refuse materials to be towed three miles outside the bar, instead of three miles outside of Sandy Hook * * *; and by striking out the word '*wilfully*' thus making it incumbent upon owners of ships to see that their agents comply with the law, and with the terms of this contract."

New York Assembly Documents, 102, Sess. 1, 1879:

"REPORT.

"*To the Governor and Legislature of the State of New York:*

"The Board of Commissioners of Pilots respectfully present the following

REPORT:

"During the past year the board have continued to regulate the pilotage system of the port of New York, under the provisions of chapter 467 of the Session Laws of 1853 and its amendments.

"The number of pilots licensed under that act is 133, and their skill and efficiency is shown by the fact that while more than 8,500 vessels were safely piloted by them during the year, but three complaints of mismanagement or incapacity were made.

"One of these, on examination, proved to be unfounded; one failed through technical objections raised by counsel, and one resulted in the punishment of the pilot.

"The board have also continued to enforce, as far as practicable, the several laws for the preservation of the harbor of New York, and for the removal of obstructions to navigation and encroachments beyond the established pier and bulk-head lines.

"Under the provisions of chapter 522 of the Laws of 1860, twelve sunken wrecks have been removed from the navigable waters of the port during the year; ten by the owners, at their own expense, upon notice from the board; and two by the board, at an expense to the county of $462.

* * * * *

"The deposit of street sweepings, ashes, etc., in the channels and on the shoals at the entrance to this harbor has continued, and in increased volume. The amount deposited is so great as to give rise to serious

fears of deterioration in the depth of water on the bar. By a report of the superintendent of street cleaning, it appears that, during the eight and a half months ending September 15, 1878, 759,462 loads of ashes and rubbish were collected—equal to 1,072,176 loads for the year; and there is every reason to believe that by far the larger portion was disposed of on the shoals and in the channels of the lower bay.

"This board have, from time to time, called the attention of the Legislature, as also that of the city authorities, to this growing evil, and its disastrous effects upon the business interests of the city and State, and have urged the construction of steam vessels specially adapted to convey the refuse materials well out to sea.

"Failing in this, they have, as far as possible, checked the evil by instituting suits against parties depositing within the limits of their authority. In this connection, the board beg leave to quote from a communication addressed to the Attorney-General of this State, on the 28th of November, 1878:

" 'The existing law of the State is of such a character that it is extremely difficult to secure conviction and punishment of the offenders. The board can only proceed against parties *wilfully* violating the provisions of the act, in civil suits instituted to recover fines and penalties attaching to such violations. But the difficulty of obtaining positive proof of each offense is very great, and even when this is secured, the board are frequently defeated in the courts by the technicalities raised by counsel, to which the phraseology of the act has given rise. It is evident that, to secure a prompt and certain punishment of offenders, existing legislation must be materially altered, and the law must be made so explicit and comprehensive in its wording as to leave no loophole of escape for those who, either in their own persons or through the agency of others, violate its provisions.

" 'That the obstructing of the great highways of this port, the inlets and outlets of consumption and production, will result disastrously to the well-being

of our great State, even to its remotest borders, must be apparent to every one who will give the subject one moment's reflection. The plan heretofore adopted for the disposal of the refuse materials, which are a product of daily accumulation in the streets of the city, is one which is fraught with danger to our mercantile and general interests. The system is of the crudest and most inefficient character, and is one which, in cities where greater enlightenment prevails in regard to this subject, would not be tolerated for a moment. The absolute injury inflicted by it would be difficult to compute in money figures.

"'The street sweepings, garbage, ashes, etc., are loaded indiscriminately on scows, and these are towed seaward, and their contents dumped at the entrance to the harbor; frequently in the channels themselves; often on the flood-tide, which carries the refuse in the direction of the city again. The heavy portions sink to the bottom, and the accumulation, thus constantly in process, lessens the depth of water, and consequent accessibility of the port, and adds greatly to the hazards of navigation. It not seldom happens that the scows, which are of the poorest construction and entirely unseaworthy, are relieved of their contents within the limits of the harbor itself, the excuse being their unfitness for encountering rough weather, when it comes; which, it is alleged, makes imperative the throwing of their loads overboard wherever they may happen to be. Such are the methods employed by the largest city in the Union for disposing of its refuse, by which hundreds of tons are deposited beneath the waters of the harbor and bay, and their approaches, daily.

"'By the terms of the State law defining the lines within which it shall be operative (chapter 671, 1857, section 1, and chapters 409, 1872, and 148, 1875), it is limited to "the bay inside of Sandy Hook," and within that line but a small amount, comparatively, is deposited in the waters of the port; but outside of that line, and unprotected by any law known to the board (either of the State or the United States), lie the most

important channels of the port, which are constantly used by vessels of the largest class. Legislation for the protection of these important channels is imperatively demanded, for it is a fact beyond dispute, that they, and the shoals bordering on them, are at present made the receptacles of most of the refuse materials from this city.'

"The board herewith present, for the consideration of the Legislature, a bill embodying amendments, which, it is believed, will have the effect of putting a stop to the evils above set forth.

"The board beg respectfully again to represent to the Legislature the inadequacy of the annual provision ($4,500) made by it for the expenses of enforcing the law, and ask for an appropriation of $6,000 for expenses, and $5,000 for compensation to the Commissioners.

"All which is respectfully submitted.

"By order of the board,

"AMBROSE SNOW,
President.

"D. A. NASH,
Secretary.

"New York, December 31, 1878."

New York Assembly Document No. 32, vol. 3, 1880, "Report of the Board of Commissioners of Pilots for the Year 1879" (Jan. 19, 1880):

"The street sweepings and other refuse materials of the city continue to be deposited in the east channel and on the neighboring flats or banks, gradually, but surely shoaling the channel, and preparing difficulties for the future commerce of our city. Two cases have lately been reported of steam-tugs grounding on the east bank where formerly there was plenty of water, and in banking their engines to get off into deep water they threw to the surface the various materials carried thither by the city scows, thus indicating clearly the cause of the shoaling.

"The board have frequently called the attention of the executive and the legislative to this evil and believe that it is unnecessary again to go over the facts and arguments further than to refer to their report of last year in which the subject is more fully treated.

"A bill designed to correct this evil was submitted by this board during the last session of the legislature, and was passed, but failed to obtain the signature of the governor.

"It will again be submitted in the hope that it may meet with greater success."

New York Assembly Document No. 24, vol. 2, 1881, "Report of the Board of Commissioners of Pilots for the Year 1880" (Jan. 17, 1881):

"The deposit of street refuse in the lower harbor, by the city scows, has continued but the amount has been much less this year than in previous years, most of it being deposited outside the bar.

"The Board respectfully refer to their reports of 1878-9 on this subject, and urge the necessity of providing the city with steam scows to carry its refuse out to sea. They should be provided with as little delay as possible. They are necessary under the present system and the possession of them will enable the city to make better terms for removing, burning or disposing of the refuse materials, should that course be determined upon. Should their use by the Street Department at any time become unnecessary, they could be turned over to the Department of Docks for moving dredgings."

New York Senate Document No. 52, vol. 5, 1882, "Report of the Board of Commissioners of Pilots for the Year 1881" (Jan. 10, 1882):

"The Board have also continued to enforce the several laws for the preservation of the harbors of New York from abuse and deterioration through artificial causes.

"The beneficial effect of these laws is greatly les-

sened in respect to the most important points intended to be effected by them, namely the prevention of improper and injurious deposits of street soil and dredgings, by the necessity of proving, in each case, that the violation of law was '*willful*' on the part of the only responsible parties connected with it. A bill to remedy this defect has been before the Legislature for several years past, but has failed to become a law. It will be again submitted at this session."

New York Assembly Doc. 109, Vol. 3, 1886:

"REPORT.

"*To the Governor and Legislature of the State of New York:*

"The Board of Commissioners of Pilots respectfully report that during the year now closing they have continued to administer the laws for the government and regulation of the pilotage of the port of New York, under the provisions of chapter 467 of the Laws of 1853, and its amendments.

"There are at present one hundred and thirty-two (132) pilots holding licenses from the board, being all (with a single exception, due to bad health) in active service.

"During the year two have died and one retired on account of physical infirmity; and two passed boat-keepers or apprentices have been licensed to pilot, in accordance with the rules of the service.

* * * * *

"The removal of fifty-nine (59) sunken wrecks has been expedited by the attention of the board's out-door inspector. By timely attention of the same officer the annual obstruction of the New York side of the North river by shad-poles and nets was prevented, the western half being incumbered as usual. The scows of the street-cleaning bureau of the city of New York have as a rule complied with the law requiring them to dump outside the bar. Reports of floating rubbish

have occasionally been received, but no actual case of improper dumping by that bureau has been detected.

"The board regret to state that the deposits of dredged materials in the waters of the port have become more numerous than heretofore.

"Want of means has always heretofore greatly restricted the usefulness of the laws on this subject, by preventing the board from employing fully the measures deemed necessary for detection of the offenders.

"Both detection and conviction were difficult and uncertain, but the skill exerted to avoid detection showed, on the part of the culprits, a fear of the law.

"During the year just passed detection has been comparatively easy, and instances have not been wanting where after being caught in the act one night, the offense has been unhesitatingly repeated again and again on the nights immediately following, thus showing that detection was not feared. The board respectfully call the attention of the Governor and Legislature to the existing state of the law in reference to these abuses in the harbor of New York.

"While Congress had undoubted power to legislate for the protection of the harbor, the settled policy of the Federal Government has been to leave this subject, as well as the kindred subject of the regulation of pilotage under the control of the State.

"After the pilotage system had been placed under the supervision of a board of commissioners elected by non-political and non-partisan bodies (the New York Chamber of Commerce and the New York Board of Underwriters) by the Pilotage Act of 1853, which has now been in successful operation for over thirty-two years, the Legislature committed to this board the duty of preventing abuses in the harbor.

"By the act of April 15, 1857 (chap. 671) it was made unlawful to deposit any refuse dirt or dredgings in the waters of the harbor, and this board was given control over the deposit of dredgings, and a penalty of $5 for every cubic yard of material illegally deposited was imposed.

"By the act of 1876 (Laws of 1876, chap. 414, p. 425) the law was amended so as to require deposit of dredgings, etc., unless put behind a bulk-head for filling, to be made at least three miles outside of Sandy Hook, and the same penalty was imposed for willful violation of the statute.

"This board set on foot and maintained an active supervision by its special agent, to prevent violations of the law, and succeeded in preventing, to a large degree, the illegal dumping, but there were repeated instances of violation at night, and in rough weather, and there was great difficulty, in the absence of any police or detective force at the command of the board, in detecting these violations.

"The board, however, endeavored to enforce the law and were making satisfactory progress, when they were met by a decision of the Supreme Court, reversing a judgment for illegal dumping, obtained by them against a contractor engaged in dredging a slip, on the ground that the violation was not 'willful,' unless it appeared that the contractor directed, or was knowing to the illegal dumping.

"This decision made the law virtually a dead letter, because if the responsible contractors who do the work of dredging are not made liable for the wrongful acts of their subordinates, who are generally without any pecuniary responsibility, the penalty for illegal dumping cannot be collected.

"The Legislature in 1882, at the instance of this board, and in order to provide a more effectual remedy for this great and growing evil, passed an amendatory act (chap. 160, Laws of 1882) by which it was provided that dredgings not deposited above high-water mark, or behind bulk-heads for filling, should be towed to sea, one mile outside of the outer bar at Sandy Hook; imposing a penalty for violation on the owner or lessee of the slip or basin dredged, and on all persons engaged in removing or transporting the dredgings.

"Under this statute the board succeeded in enforcing its penal provision against the contractors, and in the

case of the Board of Commissioners of Pilots against Ambrose, the Court of Appeals upheld the law and affirmed a judgment for penalties amounting to $3,000.

"The result of the action of the board under the law as thus amended was most salutary, and the announcement of the decision of the Court of Appeals established their right to enforce the law and collect the penalty in every case, when the violation could be proved to the satisfaction of a jury.

"At the last session the Legislature adopted an act (chap. 414, Laws of 1885) which apparently extended the provisions of law applicable to the harbor, but which, by section 8, repealed all the previously existing laws imposing penalties for unlawfully depositing dredgings, and substituted a trifling penalty of $250, to be collected by the shore inspector. By this legislation this board was deprived of all jurisdiction in the matter of unlawful dumping in the harbor.

"This act was not brought to the attention of the board until after the adjournment of the Legislature. Since its adoption, complaints on the subject have been frequent, and numerous instances of the violation of the law have been detected, but no steps seem to have been taken to punish the offenders.

"The matter is one of serious importance, and it demands careful consideration. It would seem to be unfortunate that the former law, after its benefits had been demonstrated, and its provisions judicially construed, should have been repealed without affording to the persons interested in its enforcement an opportunity to inform the Legislature as to the results of their experience.'

"But whether the old law be restored or not, it seems to the board that the existing statute is inadequate to insure proper protection for the harbor.

* * * * *

All which is respectfully submitted.

New York, December 15, 1885. AMBROSE SNOW,
President".

New York Assembly Document No. 14, vol. 4, 1887, "Report of the Board of Commissioners of Pilots for the Year 1886" (Jan. 13, 1887):

> "Although the board has been relieved of the duty of preventing unlawful deposits of dredgings in the harbor it still has a deep interest in the work.
>
> "The remarks on this subject in the last report of the Board still hold good, and the attention of the Governor and the Legislature is respectfully called thereto.
>
> "Complaints of such unlawful dumping were received from time to time and were generally referred to the Shore Inspector.
>
> "Several Reports investigated by the board's inspector proved to be well founded, and on a late night trip, scows were caught in the act of dumping in the neighborhood of Bedloes Island."

New York Assembly Document No. 56, vol. 7, 1888, "Report of the Board of Commissioners of Pilots for the Year 1887" (Jan. 3, 1888):

> "The duty of preventing and punishing illegal dumping of refuse materials in the harbor having been transferred to a special officer, the jurisdiction of this board, in matters pertaining to the harbor, other than pilotage, is much curtailed."

New York Senate Document No. 22, vol. 5, 1889, "Report of the Board of Commissioners of Pilots for the Year 1888" (Jan. 10, 1889):

> "By official notice dated November 17th the government also assumed entire control over the deposit of dredgings and other refuse materials in the waters under provision of the Act of Congress approved June 29, 1888."

Senate Report No. 1391, 49 Cong., 1st Sess. 10 (1886):

> "[The deepening of the water] can only be reached by a large expenditure of money, but the extent of the coast and foreign commerce of New York City • • •

[etc.] all justify the appropriation of a large sum at one time for the construction of permanent works of improvement at the entrance to this magnificent harbor, not only for the maintenance of the existing depth on the bar, despite imprudent dumping of city refuse matter about which so much has been written * * *"

47TH CONGRESS
1ST SESSION

REPORT
No. 743

HOUSE OF REPRESENTATIVES

"THE PORT AND HARBOR OF NEW YORK

"March 13, 1882—Referred to the House Calendar and ordered to be printed.

"Mr. D. P. Richardson, from the Committee on Commerce, submitted the following

REPORT:

[To accompany bill H. R. 1132]

"The Committee on Commerce, to whom was referred the bill (H. R. 1132) in relation to the port and harbor of New York, and the waters near the same, submit the following report:

"It is a matter of public notoriety that for years past the harbor of New York has been made the receptacle for street sweepings, dredgings from slips, ashes, and rubbish of all kinds; that the channels are being filled up and beds and shoals formed, and that the harbor is in a fair way of being seriously injured if not destroyed. Congress has hitherto left the control of the subject to the State of New York, but the State legislature has failed to efficiently protect the harbor from encroachments.

"A thorough system of police regulation, under competent direction and properly administered, is required for the protection of the harbor. The bill puts the matter under the control of the United States district attorney, and provides for a special police, to be so appointed as to secure competent officers. This will bring the whole subject within the domain of the police regulations of the general government, where it properly belongs; wherefore the committee report back the bill and recommend its passage with amendments."

"*Be it enacted, &c.*, That no street sweepings, dredgings from slips or other places, earth, dirt, stone, ballast from vessels, ashes, swill, garbage, dead animals or portions thereof, decayed or other vegetables or fruits, bedding, or refuse or rubbish of any kind shall be dumped or deposited in the waters of the port of New York, or in the rivers or waters adjoining the city of New York, or in the waters of New York Harbor or New York Bay or the Lower Bay of New York, or in the waters of the Atlantic Ocean within five miles of Coney Island or Sandy Hook, or in the Hudson River, the East River, Long Island Sound west of the Middle Ground Shoal, or in the navigable waters lying between the said sound and the East River, or in the waters bounding or adjoining the port or harbor of New York or its upper or lower bay, and including the 'Kills,' Kill von Kull, Arthur Kill, the Raritan River, Raritan Bay, Shrewsbury River, Spermacitti and Horseshoe Coves, Sandy Hook Bay, Rockaway Inlet or the bay or sound communicating therewith, Sheepshead Bay, Gravesend Bay, Princess Bay, and Gowans Bay; nor shall any article of thing that is liable to convey disease, or is putrid, unwholesome, noxious, or dangerous to the public health, or dangerous to navigation, be cast, thrown, placed, deposited, or suffered or permitted to become in said waters, or placed or suffered to be placed where said waters would ordinarily or naturally rise upon, take, or receive them, excepting, however, the ordinary discharge of sewers constructed under the authority of the laws of the State within which they are located. The above provisions shall apply to lands under the waters as well as to the latter.

"Sec. 2. That this act shall not apply to the erection or construction of any pier, dock, or bulkhead, in such manner as not to obstruct or be dangerous to navigation, or the making by filling in in a proper manner, of any land,

in cases where the erection of such piers, docks, or bulkheads, or making, by filling in of land is now authorized by the laws of the United States, or any State; that is, in cases where the same are expressly authorized by statute to be erected or made, or allowed by plans approved by the proper officers of the United States.

"Sec. 3. That the violation of any of the provisions of this act shall be deemed a misdemeanor and the person so violating the same shall, upon conviction be punished by the infliction of a fine of not less than fifty nor more than one thousand dollars for each offense, or by imprisonment as is now provided in the case of misdemeanors, or both.

"Sec. 4. That any person who shall give information leading to the conviction of any person violating this act shall receive two-thirds of the amount of the fine imposed upon such offender, upon the payment or collection of such fine. Immediately after the conviction of such offender the court or judicial officer who presided at the trial shall summarily inquire and determine who is entitled to the said two-thirds portion of said fine; but no determination shall be made unless notice be first given by the district attorney of the district to such persons as may have filed claims to such fines with the clerk of the court. Such notice may be given by mail, and, if not personal, shall be so given at least one week before the application to the court; and no claim shall be considered unless the address of the person claiming be given in his notice of claim. In difficult cases the court may direct an allowance to be given to the district attorney, out of the fine, of an amount not exceeding one-third thereof.

"Sec. 5. That the district attorneys of the southern and eastern districts of New York are hereby authorized to appoint eight special officers, to be approved as to their fitness and capacity by the board of commissioners of pilots in the city of New York, who, within the said districts and

and upon the waters mentioned in this act, shall have power to arrest all persons and deliver into custody any person taken in the act of violating any of the laws of the United States, if such violation amounts to a misdemeanor or a felony; and the police of the cities of New York and Brooklyn shall have like authority. The salaries of each of the special officers authorized by this act, during the term of their employment shall not exceed those then paid to patrolmen of the New York City police force, and shall in each case be payable only upon the certificate of the president of the said board of commissioners of pilots in the city of New York that such officer has performed his duty to the satisfaction of said board.

"Mr. Kasson. Reserving the right to object, I wish to ask the gentleman from New York if this bill is approved by the port authorities of New York?

"Mr. Hutchins. It is approved by the board of pilot commissioners unanimously, and is substantially the same as the law of the State of New York, except that there is a Federal jurisdiction exercised over the subject in the way of police officers.

"Mr. Kasson. Has it received the approval of the Committee on Commerce of this House?

"Mr. Hutchins. It has."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 56

UNITED STATES OF AMERICA, *Petitioner*,

vs.

REPUBLIC STEEL CORPORATION, INTERNATIONAL HARVESTER COMPANY, AND INTERLAKE IRON CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING ON BEHALF OF REPUBLIC STEEL CORPORATION.

PAUL R. CONAGHAN,
208 South La Salle Street,
Chicago 4, Illinois,

H. C. LUMB,
Republic Building,
Cleveland 1, Ohio,
Attorneys for Republic Steel Corporation.

STEVENSON, CONAGHAN, HACKBERT,
ROOKS AND PITTS,
208 South La Salle Street,
Chicago 4, Illinois,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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PETITION FOR REHEARING ON BEHALF OF REPUBLIC STEEL CORPORATION.

The majority opinion is based upon the assertion that clause 1 of Section 10 is broader than the other clauses of that section (and the items in Section 9) and that it stands alone. At page 4:

> "It is argued that 'obstruction' means some kind of structure. The design of § 10 should be enough to refute that argument, since the ban of 'any obstruction,' unless approved by Congress, appears in the first part of § 10, followed by a semicolon and another provision which bans various kinds of structures unless authorized by the Secretary of the Army.'"[1]

1. The argument was not that "obstructions" meant "structures" but was rather that the relief provided for illegal structures was not the same relief provided for illegal obstructions, *i.e.* injunction. See § 12.

As applied here, the majority opinion seems to say that "refuse matter"—the object of § 13—can also violate § 10 because the first clause is broad enough to encompass anything that may result in an obstruction, even though the activity is specifically covered by another section of the same statute.[2]

The majority opinion concedes that the deposits of respondents *are not proscribed* by clauses 2 or 3. At p. 5 of the opinion:

> "* * * We would need to strain hard to conclude that the only obstructions banned by § 10 are those enumerated in the second and third clauses. In short, the first clause is aimed at protecting 'navigable capacity,' though it is adversely affected in ways other than those specified in the other clauses."

If clause 1 is independent of any other provision, as it must be under the majority's construction, the mandate of Congress is unmistakable.

> "That the creation of any obstruction *not affirmatively authorized by Congress,* to the navigable capacity of any of the waters of the United States is hereby prohibited;" (Clause 1, § 10). (Emphasis ours.)

If the deposits are "obstructions", then the Secretary of the Army would have no authority to grant a permit without the affirmative authorization of Congress. This is the inevitable result of the majority's construction, and indeed seems to be recognized at p. 5:

> "* * * We can only conclude that Congress planned to ban any type of 'obstruction,' not merely those specifically made subject to approval by the Secretary of the Army."

Therefore, if the majority opinion means what it says

---

2. "It seems, moreover, that the first clause being specifically aimed at 'navigable capacity' serves an end that may at times be broader than those served by the other clauses." p. 5.

and if the words of clause 1 mean what they plainly say, then every activity which might lead to a clause 1 obstruction (and under this decision that means any obstruction not specifically enumerated in clause 2 or clause 3) must be authorized by legislation passed by Congress.

Does this decision mean that every industrial plant must petition Congress for special enabling legislation before it may lawfully discharge anything from its sewer outfalls into a navigable waterway, unless what it discharges is pure liquid? Or does the majority opinion mean that the "unless" provision within clause 1 should be completely ignored? If special enabling legislation is necessary, then § 13 has been rendered wholly meaningless and unnecessary. If the latter interpretation is intended, then this Court has repealed the "unless" provision of clause 1. It is inconceivable that the Court intended so to confuse the established law and to thwart the clearly expressed will of Congress. It is an elementary rule of statutory construction that a statute be read to give effect to all provisions.

It is inconceivable that an 1899 Congress could have intended that every public or private sewer owner petition Congress for a special Act. *Wisconsin* v. *Illinois*, 278 U. S. 367, 412, 413 (1928), expressly recognizes this and correctly construes just what the true scope of the first clause of § 10 was intended to be.

> "The words 'affirmatively authorized by Congress' should be construed in the light of the administrative exigencies which prompted the delegation of authority in the succeeding clauses. Congress, having stated in Section 9 as to what particular structures its specific consent should be required, intended to leave to the Secretary of War * * * the determination of what should be approved and authorized in the classes of cases described in the second and third clauses of Section 10."

The first clause of Section 10 merely asserts federal

jurisdiction over civil engineering activity in and around navigable waters.[3]

In this opinion, the Court has said that the discharge of liquids containing finely-divided suspended solid refuse matter is a clause 1 violation. If so, such discharges require Congressional authorization under the plain language of that clause. But the Court says such discharges do not require such authorization. The majority opinion requires only the kind of authorization that one might seek if clause 2 or clause 3 covered the activity. Then the Court says that clause 2 and 3 do not cover this case. The fact is that § 10 doesn't cover this activity. If anything covers the discharge of "refuse matter" it is the section dealing with "refuse matter"—§ 13.

II.

The utter confusion and hopeless inconsisteney flowing from the majority's application of § 10 in this case further demonstrates that Congress intended to treat with deposits from sewers under § 13 only. On this point the majority opinion states that respondents' discharges, comprised 99.98% of pure water, are not in the "liquid state". This is explained by an incomprehensible statement on page 8 of the opinion:

> "All matter in suspension is not saved by the exception clause in § 13. Refuse flowing from 'sewers' in a 'liquid state' means to us 'sewage'."

If "sewage" is intended to mean organic wastes, then

3. That section, comprised of three clauses, retains supervision of projects that completely encompass such waters in Congress itself (bridges, dams, dikes, causeways; as recited in § 9) and delegates control of the remainder of such activities to the War Department (now the Secretary of the Army). Whether, as the majority opinion indicates, clause 1 might sometimes be broader than *Wisconsin* v. *Illinois* held it to be, there is no occasion to broaden it here. Here there is a specific section of the 1899 Act dealing with "refuse matter" discharges—§ 13.

it would follow that § 13 makes it unlawful to permit any inorganic wastes whatsoever to be discharged from a sewer into navigable waters, unless a permit is obtained from the Secretary of the Army. This construction wholly ignores the physical composition of municipal sewage as well as industrial sewage.

> "Solids in sewage may be classified as organic and inorganic. The organic solids, usually constituting 40 to 70 per cent of the total solids, cause putrefactive odors and the greatest difficulties in sewage disposal. The inorganic solids are usually innocuous and comprise the greater portion of easily settled grit." Babbitt and Baumann, "Sewerage and Sewage Treatment," p. 5 (8th Ed., 1958).

Is this Court declaring that henceforth all privately and municipally owned sewer systems must segregate their inorganic wastes or be denied permission to discharge their effluents into navigable waters except upon terms laid down by the Secretary of the Army? It is plainly impossible to segregate organic from inorganic sewage in any practical sewer operation, and it has never been done anywhere. The same impossible burden of segregation is imposed on privately and publicly owned sewage systems if the Court means that "sewage" is limited to non-industrial wastes.

The only other conceivable explanation is that the Court means the "liquid state" exception of § 13 is applicable to municipal sewer outfalls but not to refuse matter flowing from a privately owned sewer. Assuming such a distinction is otherwise valid, it makes the right to use navigable waterways as a medium for the disposal of industrial wastes depend upon whether the waste is discharged directly to the waterway or is first passed through a municipal sewer.

"Sewage" is described in the Glossary of Water and

Sewage Control Engineering, published by the American Society of Civil Engineers, 33 West 39th Street, New York, New York, 1949, under the joint sponsorship of American Public Health Association, American Society of Civil Engineers, American Water Works Association and Federation of Sewage Works Associations.[4]

For the convenience of the majority a copy of this Glossary is filed with the Clerk of the Court.

Sewage (p. 198) is defined: "Largely the water supply of a community after it has been fouled by various uses. From the standpoint of source it may be a combination of the *liquid or water-carried wastes* from residences, business buildings, and institutions, *together with those from industrial establishments, and with such ground water, surface water, and storm water as may be present.*" (Emphasis ours.)[5]

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4. The Historical Summary (p. 3) states that the comprehensive Glossary (274 pages) of terms for use in water and sewage control engineering originated with three groups: (1) The Water Resources Committee of the National Resources Planning Board, a federal agency abolished in 1943; (2) A joint committee on Water Works Terms, originated by the American Water Works Association (AWWA) and including representation from the American Society of Civil Engineers (ASCE) and the American Public Health Association (APHA); and (3) The Sanitary Engineering Division of the American Society of Civil Engineers.

• • • • •

The Historical Summary in the Glossary (p. 4) further states:

"Since most of the definitions apply equally in the fields of **sewage treatment** and **water treatment**, the word **'liquid'**, has been used to designate either **water or sewage.**" (Emphasis ours.)

5. Additional "units of expression" from the Glossary are:

Industrial sewage: "Sewage in which industrial wastes predominate."

Sewer: "A pipe or conduit, generally closed, but normally not flowing full, for carrying sewage *and other waste liquids.*"

Industrial wastes (p. 253): "The *liquid wastes from industrial processes* as distinct from domestic or sanitary sewage." (Emphasis ours.)

"Sewage and Sewage Treatment" by Babbitt & Baumann, 8th Ed., 1958, a well known text and reference book (p. 1) states: "A sewer is a channel or conduit intended for the conveyance of liquid wastes."

Sewage is defined (p. 3) as: "Used water together with such organic and inorganic solids, liquid industrial wastes, ground water, and dry-weather runoff as may be mixed with it."

The physical characteristics of sewage are stated (p. 5) as follows: "Sewage contains a small amount of solids in a proportionately tremendous weight of water. In normal, domestic sewage it may be expected that 1 ton or more of water will carry 1 lb. of solids [equivalent to 500 parts per million], of which ½ lb. is in solution, ¼ lb. will settle, and ¼ lb. is in suspension."

"Principles of Industrial Waste Treatment" by Gurnham, 1955, also a well-known text and reference book (p. 6) states: "All wet-process industries produce liquid wastes." Settleable solids are described (p. 48) as follows: "Settleable suspended solids occur in all sewage and practically all industrial wastes forming one of the major pollutional characteristics of these liquids. Settleable solids may be inert and inorganic . . . or they may be organic in nature as in wastes from pulp and paper manufacture and the food industries."

The record is clear that the Calumet River contains sanitary sewage, domestic sewage, household wastes, raw sewage, septic tank sewage, industrial sewage, ground water, surface water, storm sewage, the combined sewage from the City of Chicago discharged in time of storm and

at times Sanitary District sewage discharged into the river during unusually heavy rainfall.[6] *This sewage is pumped from the Calumet River into the plant of Republic as cooling water and is discharged into the Calumet River. The effluent remains "sewage".*

To writers familiar with the subject herein discussed, "liquid industrial wastes" in various industries constitute frequent topics in various publications. We set forth a compendium in Appendix A.

To exclude liquid industrial wastes from "*any refuse*

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6. The Superintendent of Great Lakes Carbon Corporation testified for the government with respect to the plant directly across the Calumet River from Republic's plant. He admitted (R. 684) that an 8" sewer carrying septic tank sewage from his plant emptied into the Calumet River. This sewage continued 24 hours per day (R. 684).

An engineer of treatment plant design for the Metropolitan Sanitary District of Chicago, testifying for the government, admitted (R. 475) that storm water from the City of Chicago's sewers empty into the Calumet River; that this storm water

> "is a mixture of suspended solids, that is, it is sewage. Chicago has a combined sewer system. In other words, sanitary sewage and storm flow flow in the same sewers, so that in time of storm it is intermixed into same, so that the discharge of storm water would be identical with that which continues to go to the sewage treatment works, or nearly so". (R. 474).

The Sanitary District pumps out "of the pumping station from one receptacle into the Calumet River * * * and that receptacle in times of severe rains contains sanitary sewage and storm sewage * * * It contains sanitary sewage from points * * *" as far north from the 95th Street pumping station as 87th Street (R. 477). On October 10, 1954 "there was a total of 30,700,000 cubic feet" of combined sewage from the 95th Street pumping station pumped into the Calumet River (R. 478).

A civil engineer in the Bureau of Sewers in the Department of Water and Sewers, employed by the City of Chicago for approximately 50 years, testified for the government with respect to storm sewage, sanitary sewage and combined sewage which empties directly into the Calumet River. He testified that "somewhere between a half inch of rain and an inch of rain might cause" the 95th Street City of Chicago sewer to overflow into the Calumet River; that "the combined sanitary and storm sewer at 95th Street" covers approximately 300 to 500 acres within the City of Chicago (R. 487).

matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state * * *" is to mutilate the plain meaning of plain words used every day throughout the land.

Respectfully submitted,

PAUL R. CONAGHAN,
208 South La Salle Street,
Chicago 4, Illinois,

H. C. LUMB,
Republic Building,
Cleveland 1, Ohio,
Attorneys for Republic Steel Corporation.

STEVENSON, CONAGHAN, HACKBERT,
ROOKS AND PITTS,
208 South La Salle Street,
Chicago 4, Illinois,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that this petition for rehearing is filed in good faith and not for purposes of delay.

PAUL R. CONAGHAN.

APPENDIX.

A.

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vs.

REPUBLIC STEEL CORPORATION, INTERNATIONAL HARVESTER COMPANY and INTERLAKE IRON CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION OF INTERLAKE IRON CORPORATION, ONE OF RESPONDENTS, FOR REHEARING.

RAYMOND T. JACKSON,
WARREN DAANE,
1956 Union Commerce Bldg.,
Cleveland 14, Ohio,
HENRY E. SEYFARTH,
231 S. LaSalle St.,
Chicago 4, Illinois,
Attorneys for Respondent Interlake Iron Corporation.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5647

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION OF INTERLAKE IRON CORPORATION, ONE OF RESPONDENTS, FOR REHEARING.

Interlake Iron Corporation, one of the Respondents, prays that this Court grant a rehearing of its decision of May 16, 1960 and affirm the decision of the Court of Appeals for the Seventh Circuit.

REASONS FOR GRANTING A REHEARING.

A. Basic Assumptions Which Underlie and Permeate the Entire Decision.

First: A basic assumption underlying the opinion is that the sole purpose of the Congress, in enacting the Rivers & Harbors Act of March 3, 1899, was to subordinate all non-navigation uses of navigable waters to their use for navigation without regard to the effect of so doing

upon the national economy. Instead, Congress was plainly exercising its exclusive constitutional authority to balance both national and local interests in the use of navigable waters for navigation and non-navigation purposes. (Interlake Br. 28-30.)

Second: A second underlying basic assumption is that, in the guise of "charitable" construction, the Court could properly or lawfully perform a Procrustean operation upon both the substantive and the remedial sections of the Act in order to accomplish completely what had theretofore been erroneously assumed to be the congressional purpose.

Third: A third underlying basic assumption is that, where Congress has enacted comprehensive legislation which creates substantive offenses or causes of action and carefully selected penal and civil remedies which it believes to be best adapted to accomplishing its purpose, the Court may disregard the Congressional remedies and create, by *inference*, such other or different remedies as the Court concludes would be desirable but which were not created by the Congress.

In indulging each of the foregoing assumptions the opinion, we respectfully submit, usurps the exclusive Constitutional authority of Congress. Const. Art. I, Secs. 1, 8; *Youngstown Co. v. Sawyer*, 343 U. S. 579, 587-8; *Gilman v. Philadelphia*, 3 Wall. 713, 725; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 701.

B. Section 10 of the Act Is Plainly Inapplicable.

All Sections of the Rivers & Harbors Act of 1899 are *in pari materia* and must be construed together. No one would suggest that the construction of a bridge, dam, dyke or breakwater is governed by § 10 instead of by

§ 9 of that Act. Prior to the instant decision, no one, we venture, would have supposed that the discharge of "any refuse matter of any kind or description whatever" was governed by § 10 instead of by § 13 of the Act. Indeed, in the alleged administrative construction, upon which the opinion erroneously relies, no pretense is made that such discharges were or are governed by § 10. (Cf. Op. 8,* fn. 5, and Appellant's Br. App. C, pp. 89, 90, 92.) To construe § 10 as applicable to such discharges is contrary to established principles of statutory construction and, we submit, contrary to the intent of Congress. Moreover, all prior construction of the first clause of § 10 has been that the words "any obstruction" in that Section referred to obstructions which are created or constructed in the conventional sense. E.g., *United States v. Bigan* (3rd Cir.), 274 F. 2d 729, 731, 732; *United States v. Wilson* (2nd Cir.), 235 F. 2d 251.

To support a contrary view, the opinion (pp. 6-7) relies principally, if not wholly, on *Sanitary District v. United States*, 266 U. S. 405. For that purpose the opinion (pp. 6-7) erroneously assumes that the structures there involved "were *not* 'in' navigable waters." The Chicago River and its branches and the Calumet River had been held navigable long prior to the *Sanitary District* case. *Escanaba Co. v. Chicago*, 107 U. S. 678 (1882); *Cummings v. Chicago*, 188 U. S. 410 (1903). Disregarding the fact that the Government did not seek to compel removal of any structures but, instead, sought only to compel the Sanitary District to reduce its diversion to the amount authorized by federal permit, the opinion (p. 7) erroneously attaches great significance to the fact that the decree

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* Citations to the Court's opinion are to the paging of the official print and are abbreviated "Op. ."

sought and granted, did not compel removal of any "structure" but merely enjoined any diversion in excess of the amount authorized by the existing federal permit. Patently the case furnishes no support for a conclusion that the first clause of § 10 applies to the discharge of refuse matter of any kind whatever or for the opinion's construction of that clause.

During a long period of years beginning at least as early as July 3, 1896, the Sanitary District had applied for and obtained numerous *conditional* federal permits under the Acts of July 13, 1892 and of March 3, 1899 for the building of numerous structures in the Chicago and Calumet Rivers. (Interlake Br. 48-9.) Some of these structures involved very extensive excavations and fills. Others involved the construction of bridges, by-passes, docks, wharfs, dams and sluicegates.* The Sanitary District could not lawfully do any of these things without such permits and was estopped to challenge the validity of the conditions incorporated therein; and in the *Sanitary District* case the United States merely enforced those conditions.

The opinion's reliance upon *Wisconsin v. Illinois*, 278 U. S. 367 reflects a clear misconception of that case. (Op. 7.) That was an action brought by States under the original jurisdiction of this Court. The complainant States were entitled to invoke, and this Court had power to apply,

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* Thus the permit of July 13, 1893 granted *conditional* authority to construct bridges, by-passes and docks and wharfs. The permit of November 16, 1897, granted conditional authority to widen a certain section of the Chicago River and to construct bypasses and docks. The permit of March 8, 1899, granted conconditional authority to construct certain movable dams and sluicegates. Every permit was conditioned that the Sanitary District could not maintain or use the structures to divert any water in excess of such amounts, if any, as the Secretary of War might authorize from time to time.

any law applicable to the case, whether federal law, state law or international law. *Kansas v. Colorado*, 185 U. S. 125, 146. The Rivers & Harbors Act of 1899 was involved only because the defendants pleaded a permit issued by the Secretary of War on March 3, 1925, as a defense. This Court held that the Secretary had exceeded his authority in granting the permit merely to aid the Sanitary District in disposing of its sewage (l. c. 418, 420); that the State of Illinois had no authority to divert water to the injury of the complainant States; and that the diversion should be reduced to such negligible amount, if any, as might be needed to maintain navigation in the Chicago River. (l. c. 418.) The case was again referred to the Master to hold further hearings, to report and to recommend a form of decree. The decree ultimately entered had no relation to the federal permit under which the Sanitary District had claimed a right to divert water. *Wisconsin v. Illinois*, 281 U. S. 179, 201. Manifestly, the case is wholly inapposite to any issue presented in the case at bar.

C. Interlake's Acts Plainly Do Not Violate Section 13.

Section 13 makes it unlawful to discharge from "any manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state." The opinion concedes that the discharges from Respondent's sewers are covered by the section but seeks to avoid the inescapable conclusion that the discharges from Respondent's sewers come within the exception by an unsupported and unreasoned assertion that: "Refuse matter from 'sewers' in 'a liquid state' means *to us* 'sewage'." * (Op. 7-8.) To make the foregoing asser-

* Emphasis supplied except where otherwise noted.

tion meaningful the word "sewage" must be intended to mean "domestic sewage." Nothing in the legislative history of the Act supports such an emasculation of the plain and ordinary meaning of the language of the exception; and the circumstances under which the statute was enacted refute such a suggestion. (Interlake Br. 29-30.)

Such statements as that fine materials in the discharges from Respondent's sewers are "inorganic solids," that part of such fine materials "were in suspension, not in solution," and that some "organic matter in (domestic) sewage, may undergo chemical change" and that some may "settle out" (Op. 7-8), furnish no basis for such a construction. *First*, municipal sewer systems carry both trade and domestic wastes and both organic and inorganic solids in suspension. *Second*, fine inorganic solids are less objectionable both to navigation and public health than are organic or putrescible solids. *Third*, domestic sewage contains both organic and inorganic solids in suspension. *Fourth*, the decomposition or purification of organic matter in domestic sewage (either through oxidation by dilution in flowing water or by other processes) does not mean that such organic matter is consumed or dissolved, but only that it is converted into inert solids which are unoffensive and innocuous to the public health and which largely, but not wholly, settle out of suspension. (Interlake Br. 30fn*, 35fn*, 38, 39fn*.)

By an unsupported and erroneous assumption that the statutory language does not have its normal and ordinary meaning, the exception is emasculated, and nothing is added by saying that there is no reason to "enlarge" the exception by including industrial discharges merely because discharges from streets and (domestic) sewers also contain suspended material which may settle out and impair navigability. (Op. 8-9.)

The opinion's reliance upon an alleged administrative construction of the 1899 Act (Op. 8, fn. 5) is, we submit, plainly erroneous and inadmissible. (Interlake Br. 27, fn.*, 63-8.)

The opinion's statement (Op. 8, fn. 5) that the current improvement in the Calumet River was authorized by the Act of August 30, 1935 (49 Stat. 1028, 1036) on the basis of a report from the Army Engineers, in which the costs were computed on the basis that shoals created by the deposit of solids would be removed by the company creating them (Illinois Steel Company), is explicable only by an unconsidered acceptance of Appellant's completely erroneous assertion, without checking such assertion against H. R. Doc. 494, 72nd Cong., 2nd Sess. (Interlake Br. 69-70). A cursory examination of paragraph 9 on page 24 of H. D. 494 (cited Op. 8, fn. 5) shows that the paragraph is merely the *Division Engineer's summary of the District Engineer's* recommendations for improvements of the outer harbor and of the Calumet River at an estimated cost of *$8,140,000;* that the District Engineer's recommended improvements and his cost estimates were successively rejected by the Division Engineer, the Board of Engineers and the Chief of Engineers, and that the controlling recommendations of such superior officers, upon which Congress acted, were for entirely different projects at an estimated cost of only *$4,540,000* and made no reference to the removal of any shoal by Illinois Steel Company or by any one. H. D. 494, p. 28, para. 12; pp. 6-7, par. 6, pp. 3-4, para. 7.

D. Even if a Violation of Section 10 or Section 13 Had Been Shown, Appellant Has No Cause of Action for Injunctive Relief.

In support of a contrary conclusion the opinion cites § 17 which provides that "the Department of Justice shall *conduct* the legal proceedings necessary to enforce Sections Nine to Sixteen inclusive, of this Act." (Op. 9.) Apart from the controlling fact that the Congress carefully selected and created the penal and civil remedies which it deemed appropriate, a mere *direction* that a certain Department shall conduct legal proceedings could not reasonably be construed as creating any cause of action whatsoever. As stated in the dissenting opinion, such language does no more than allocate responsibility among the departments of the Government. (Diss. Op. 15-16.)

Such penalties as may be invoked and such civil causes of action as may be maintained for a violation of those sections are wholly statutory and can have no existence apart from the Congressional Act. Manifestly, the Attorney General could not sue for any penalty or prosecute for any crime not created by the statute. No one could seriously contend that the Attorney General could maintain an action for damages or for a mandatory injunction for a violation of § 14 or § 15 of the 1899 Act, for the enforcement of which Congress provided solely the penalty prescribed in § 16 of the Act. *United States v. Wilson* (2nd Cir.) 235 F. 2d 251. By what logic can it be concluded that Congress authorized, or intended to authorize, the Attorney General to maintain an action for a violation of § 10 or § 13 of the Act which is not authorized, respectively, by either § 12 or by § 16 of the Act?

Sanitary District v. United States, 266 U. S. 405 does not, as the opinion states (pp. 9-10), support a conclusion that Appellant can obtain injunctive relief under § 12 of

the Act. As previously noted, that was an action to enforce the conditions of permits which had been issued on applications of the Sanitary District for the construction of numerous structures in navigable waters. *Supra*, 3-4. The Government could have maintained an action to compel the removal of such structures for violation of their conditions. It could and did invoke only the narrower remedy of bringing an action to compel observance of such conditions by restricting diversion to the amount authorized. The right to the remedy of injunctive relief in the *Sanitary District* case is wholly inapposite to any issue in the case at bar.

The issue is not whether the Attorney General, by virtue of his office, can prosecute any cause of action which the Government possesses. The question is whether the Attorney General, by virtue of his office, of § 17 of the Act or of some ominous inherent power, can create a federal cause of action for injunctive relief where none exists.

In support of a conclusion that the Attorney General can bring an action for injunctive relief for a violation of § 10 or § 13 of the Act even though none is authorized by the sections provided by Congress for their enforcement, the opinion (p. 10) also cites *United States v. San Jacinto Tin Co.*, 125 U. S. 273. That was an action to assert property rights of the Government in land for which the defendants had allegedly obtained a patent by fraud. Manifestly, no special statute was necessary to authorize the Attorney General to maintain the suit. (l. c. 284-5.) Moreover, this Court stressed that the suit could not be maintained merely because it was brought by the Attorney General but solely upon a showing that the Government had a good cause of action. (l. c. 285-6) The *San Jacinto* case was decided unanimously by the same Court and at the same term as was the case of *Willamette Iron Bridge*

Co. v. Hatch, 125 U. S. 1. It would be strange indeed if that Court laid down directly conflicting principles in two cases unanimously decided at the same term.

Finally, upon the erroneous and unsupported assumption, underlying the whole opinion, that the Congress intended arbitrarily and completely to subordinate the non-navigation uses of navigable waters to navigation no matter how disastrous the effect upon the national and local economies, the opinion states that "appropriate remedies may be fashioned even though they rest on *inferences*" (Op. 10)—and even though the statutes are criminal in nature. Such a holding, we respectfully submit, upsets the balance which Congress had painstakingly sought to create and maintain in navigation and non-navigation uses of navigable waters, thwarts the will of Congress and usurps the exclusive constitutional authority of Congress to regulate and protect navigable waters under the commerce clause.

It would be difficult, and for us it is impossible, to cite another subject confided to the exclusive care of Congress in which this Court should exercise greater care to avoid any possibility of judicial legislation. If, after 60 years, any amendment to the 1899 Act is desirable in the public interest, it can be fashioned by Congress after full hearings with due regard for all interests involved and without applying an axe retroactively. Throughout our national history, Congress has deemed it in the national interest for the federal government to bear the major cost of maintenance dredging and of maintaining other navigation works. Whether and to what extent any change in this policy would be in the national interest is solely for the determination of the Congress.

CONCLUSION.

For the reasons set forth above and in Interlake's brief, it is respectfully urged that rehearing should be granted and that, upon such rehearing, the judgment of the Court of Appeals for the Seventh Circuit be affirmed.

Respectfully submitted,

RAYMOND T. JACKSON,
WARREN DAANE,
HENRY E. SEYFARTH,
Attorneys for Respondent,
Interlake Iron Corporation.

BAKER, HOSTETLER & PATTERSON,
SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON,
Of Counsel.

June 8, 1960.

Certificate of Counsel.

I certify that the foregoing petition is presented in good faith and not for delay.

RAYMOND T. JACKSON.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 56

UNITED STATES OF AMERICA,
Petitioner,

vs.

REPUBLIC STEEL CORPORATION, INTERNATIONAL HARVESTER COMPANY AND INTERLAKE IRON CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION OF RESPONDENT INTERNATIONAL HARVESTER COMPANY FOR REHEARING.

W. S. BODMAN,
DAVID G. MOYER,
PETER A. DAMMANN,
GEORGE W. THOMPSON,
120 West Adams Street,
Chicago 3, Illinois,
Attorneys for Respondent, International Harvester Company.

THE BURTHORP-WARREN PRINTING COMPANY, CHICAGO.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION OF RESPONDENT INTERNATIONAL HARVESTER COMPANY FOR REHEARING.

International Harvester Company, one of the respondents, prays that this Court grant a rehearing of its decision of May 16, 1960.

REASONS FOR GRANTING PETITION FOR REHEARING.

By equating the words "refuse matter * * * flowing from * * * sewers * * * in a liquid state" with "sewage" and apparently limiting the meaning of the word "sewage" to domestic wastes, the Court misconstrued Section 13 of the Rivers and Harbors Act of 1899. The Court's interpretation

of the "liquid state" exception has never before been seriously urged or considered in this case. The Court erroneously implies, without a critical analysis of the problems involved, that its "charitable" construction of Section 13 will promote the national policy with regard to water resources and that a "great design" of the 1899 statute will be carried out. Actually, the Court merely disturbs the balance, with respect to a relatively narrow problem, which Congress established in 1899 between various uses of navigable waterways.

I. Section 10 of the Rivers and Harbors Act Does Not Apply.

The contentions of this respondent with respect to the meaning of the term "any obstruction" are set forth in respondent's brief and in the dissenting opinion in this case.

II. This Case Is Clearly Within the "Liquid State" Exception of Section 13 of the Rivers and Harbors Act.

The opinion of the Court states in part (pages 7-9):

> "* * * § 13 bans the discharge in any navigable water of 'any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state.' The materials carried here are 'industrial solids' * * *. The particles creating the present obstruction were in suspension, not in solution. * * * All matter in suspension is not saved by the exception clause in § 13. *Refuse flowing from 'sewers' in a 'liquid state' means to us 'sewage'.* * * * The fact that discharges from streets and sewers may contain some articles in suspension that settle out and potentially impair navigability is no reason for us to enlarge the group to include these industrial discharges. We * * * cannot * * * broaden the exception in § 13 because other matters 'in a liquid state' might logically have been

treated as favorably as sewage is treated." [Emphasis added.]

The Court concedes that the mere presence of particles of solids in suspension does not prevent "refuse matter" from being in "a liquid state." But the Court limits the liquid state exception to "sewage."

The statute does not use the word "sewage", but it does say "refuse matter of any kind or description whatever." Nevertheless, the Court rewrites the exception to read "sewage" and then apparently assumes that sewage consists of something other than material from the sewers of these defendants.

We respectfully submit that there is nothing in the legislative history of the statute, its administrative interpretation or the ordinary meaning of language which supports the Court's attempt to limit the application of the exception to domestic wastes.

The primary and established meaning of the word "sewage" is now and was in 1899 "the waste matter of domestic, commercial, and industrial establishments carried off in sewers" [Funk and Wagnalls New Practical Standard Dictionary (1956)]; or "the contents of a sewer or drain; refuse liquid or matters carried off by sewers" [Webster's New International Dictionary, Unabridged, 2nd Edition]; or "that which passes through a sewer" [See *Morgan* v. *City of Danbury*, 67 Conn. 484, 35 A. 499, 500 (1896)]. In fact, the meaning of the word "sewage" is simply "refuse matter flowing from sewers"—*which is the language of the statute in this case!*

The Attorney General, in 1897, obviously had no inkling that non-domestic wastes were not covered by the words "refuse matter". See 21 Op. of Atty. Gen. 494-495. And the administrative interpretation to which the Court refers, although not inconsistent with the Court's theory, really does not support it. The fact is, the deposits of

which the Army Engineers complained in the past were located adjacent to sewer outfalls, and therefore undoubtedly consisted of materials not in suspension.

The language of Section 13 expressly negates the construction, implicit in the majority opinion, that Congress intended to limit the liquid state exception to domestic wastes. The very same sentence which contains the exception refers to the discharge of material "from the shore, wharf, manufacturing establishment, or mill of *any kind.*" Surely this respondent's plant is a "manufacturing establishment, or mill of *any kind.*" What is forbidden is the discharge from a "mill of any kind" of "any refuse matter of any kind or description whatever." Then comes the exception: "other than that flowing from streets and sewers and passing therefrom in a liquid state." The word "that" obviously refers back to "refuse matter of any kind or description whatever" discharged from a "manufacturing establishment, or mill of any kind."

In sum, Congress did not use the word "sewage" but rather the words "any refuse matter of any kind or description whatever." It expressly covered the problem of discharges of refuse matter from a manufacturing establishment or mill "of any kind" and specifically and intentionally exempted *"that* flowing from streets and sewers and passing therefrom in a liquid state." Accordingly, we respectfully submit that there is no basis for the Court's conclusion that Congress did not intend to include in the exception refuse matter in a liquid state flowing from respondents' sewers.

A correct interpretation of Section 13 would not be unduly prejudicial to the government.

There is necessarily a dividing line between effluent in a "liquid state" and effluent not in a liquid state. Effluent containing relatively large particles (either of domestic, industrial or other refuse matter) propelled by

the hydraulic action of the water, could not be said to be liquid. On the other hand, effluent containing only particles so fine that they cannot be seen through an ordinary microscope must surely be within the exception of the statute. The dividing line is somewhere between these two extremes.

We submit that the only reasonable and workable distinction is that recognized by the Attorney General in 1897. See 21 Op. of Atty. Gen. 594-595, where the Attorney General indicated that material which would be deposited upon the stream bed "by the ordinary prompt action of gravity" would be non-liquid and that material which is in physical solution and which is precipitated out would be in a liquid state. Certainly the government has suggested no better distinction, and there is no other authority which suggests any. The administrative history to which the Court has referred certainly cannot be a basis for the distinction which the Court draws, although it is perhaps a basis for a determination that relatively large particles which settle out in the vicinity of industrial sewers are for that reason non-liquid. The discharges of which the Army Engineers have complained in the past were of that type.

We agree with Mr. Justice Holmes that "a river * * * is a treasure". We also agree that legislation truly intended and properly fashioned to balance the manifold interests of society in our rivers for the common good should not be read narrowly to defeat such a purpose. But the statute in question in this case not only was not intended for such a purpose but is plainly not suited to accomplish it.

The "great design" of the 1899 statute was simply to prevent unreasonable obstructions to navigation without placing an undue burden on other social interests recognized as legitimate at the time. The principal social in-

terest recognized by the exception in Section 13 was the interest of society in using rivers as the natural *termini* of our sewers[1] and that interest was recognized as paramount. The Act does not purport to recognize other social interests, such as water conservation and the prevention of water pollution, which today are considered at least as vital. What is more important, the Act is not designed to protect or advance such interests.

The fact is that navigation is just one of the numerous socially necessary uses to which water is put. Water is necessary for use in manufacturing establishments and mills of almost every conceivable kind. A holding that water after use in a manufacturing establishment or mill cannot be returned to its source, in this case the Calumet, if the water contains a minute percentage of industrial solids assumes a technological proficiency not yet attainable.

In arriving at its decision with respect to the interpretation of Section 13, the Court must have overlooked the other federal statutes which bear on the same subject—the discharge of wastes into navigable waters. Some of these statutes are referred to in Harvester's brief, pages 26 and 27, and in Republic's brief, pages 22ff. For example, the Ohio River Valley Water Sanitation Compact, approved by the Act of July 11, 1940, 54 Stat. 752, calls for the removal of "not less than forty-five per cent (45%) of the total suspended solids" from sewage[2] discharged into

1. The discharge of sewers into rivers always had some effect upon navigation. See *Wisconsin* v. *Illinois*, 278 U. S. 367, where it is noted that sewage from the City of Chicago at one time rendered the Sanitary District Canal virtually unnavigable.

2. The Compact apparently uses the word "sewage" to designate domestic wastes in contradistinction to industrial wastes, which are treated separately. But notice that the Compact itself supplies the meaning of the word "sewage". In contrast, the 1899 Act uses only the generic phrase "refuse matter", and clearly uses that phrase to designate all refuse matter, domestic as well as industrial.

the Ohio River complex, and for the treatment of all "industrial wastes" discharged therein in such manner as to "protect the public health or * * * preserve the waters for other legitimate purposes" to the degree determined necessary by a Commission. In addition, the Compact calls for the treatment of "all sewage or industrial wastes" discharged into any intrastate tributary of the Ohio River complex to the extent necessary to maintain such waters in a "sanitary and satisfactory condition" at least equal to the condition of the waters of the interstate stream into which such intrastate stream flows. (Art. VI.) Section 4 of the approving Act provides that "Nothing contained in this Act or in the compact herein approved shall be construed as impairing or affecting the sovereignty of the United States or any of its rights or jurisdiction in and over the area or waters which are the subject of such compact."

If the interpretation of Section 13 of the 1899 Act adopted by the Court were correct, the discharge of *any* industrial wastes containing suspended solids into navigable rivers (including the Ohio River complex) would become unlawful unless the Secretary of War permits such discharge by administrative action. In other words, the work of the Commission created by the Compact would be subject to the supervision of the Chief of Engineers, a result which it is impossible to believe Congress contemplated in 1940. The fact is, if the intention which the Court imputed to the 1899 Congress ever existed, it has been unrecognized for 61 years.

Moreover the Compact and other legislation referred to in earlier briefs contain carefully considered standards for the guidance of executive action and detailed administrative provisions with requirements for notice and an opportunity to be heard. Such provisions are absent from the 1899 Act. This omission is in itself a very strong indica-

tion that Congress in 1899 did not intend that the Chief of Engineers should assume primary jurisdiction over the industrial use of water.

CONCLUSION.

We will not reargue here the other issues in this litigation but rest upon what was said in the briefs and in the dissenting opinions of the Court. We respectfully submit this petition for rehearing because we sincerely believe that Section 13, when read in the light of ordinary English usage, expressly permits respondents' use of the water of the Calumet river and that the Court has reached a result directly contrary to the intent of Congress.

Respectfully submitted,

W. S. Bodman,
David G. Moyer,
Peter A. Dammann,
George W. Thompson,
120 West Adams Street,
Chicago 3, Illinois,
Attorneys for Respondent, International Harvester Company.

Wilson & McIlvaine,
120 West Adams Street,
Chicago 3, Illinois,
Of Counsel.

I certify that the foregoing petition for rehearing is presented in good faith and not for delay.

W. S. Bodman.